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DANDANITI IN THE INDIAN TRADITION

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SUNIL SONDHI

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NEW DELHI

Dandaniti in the Vedic Tradition

The Realist Aspect of Indian Spirituality

Sunil Sondhi

Introduction

A simplistic and superficial view of Indian culture and civilisation is that it is spiritual rather than realist. An excessive dose of religiosity and disregard of material interests are talked of as the characteristic features of the Indian mind in which spiritual perspective is seen as incompatible with aggressive defence of basic values of individual and social life. These interpretations of Indian temperament are not at all borne out by facts of Indian history. It seems that adequate attention has not been given to the study of the *Vedas, Mahabharata, Ramayana, Dharmasastras*, *Arthasatsra*, *Niti-Shastras,* and other treatises on warfare, law enforcement and diplomacy.

Binoy Kumar Sarkar used the term "Transcendentalized Positivism" for the Indian ideal of synthesis and harmony of practical and the spiritual, particular and the universal.[1] Sarkar saw in the *Smriti, Niti, Artha, and* literature, the same vigour in social life, the practical and positive outlook, and the emphasis on "moral duties" that characterizes the *Shruti* literature in the *Vedas* and *Upanisads,* whose ambition was no less than that of connecting with not only the "lithosphere from sea to sea, but also the atmosphere and the skies", and realization of the transcendental in and through the immanent, and freedom through the law.[2]

S. Radhakrishnan was more forthright, "We cannot say that violence is evil in itself. Destruction is not the aim of fighting in all cases. When its aim is human welfare, when it respects personality, then war is permissible. If we say that the criminal's personality should not be violated, even when he violates the personalities of others, if we treat the gangster's life as sacred, even when he brings about the destruction of several lives more valuable than his own, we acquiesce in evil. We cannot judge the use of force, as good or bad, by looking upon it in isolation".[3]

[1] Positive Background, p.7
[2] ibid. p.15.
[3] Radhakrishnan, p.203

In Indian tradition use of *dandaniti*, or dandaniti, is considered an obligation to check the criminal, protect the helpless, and restore social order. Such a use of force is considered constructive as it strengthens orderly conduct by restraining disorderly behaviour. It works for the ultimate good of both the individual and the society. Law enforcement action against willful internal and external threats is necessary for the protection of political, economic, and cultural system of a society against forces of disruption and anarchy, and for proactive promotion of common good.

Vedic Roots

The Vedas give us a hierarchy of different levels of reality down from the all-embracing absolute, which is the primary source as well as the final consummation of the world process. The different kinds of being are seen as the higher and lower manifestations of the one absolute spirit. There is correspondence or underlying unity between the absolute and the relative, the unmanifest cosmic reality is not separate or isolated from the objective reality. Whatever is in the cosmos and beyond is essentially true in the individual also. Whatever is stated of the cosmic reality is applicable to the human body, and each individual is spoken of as a descendant of the cosmos. [4]

The universal is collective. The collective is of no importance without the particular and the latter cannot exist without the former. If the collective is not manifested in creative individuality, and it remains enclosed within its rigid unity, it would neither be the universal nor the highest power. The collective and the individual are not exclusive. One cannot exist without the other; individuality is the fulfillment of the collective; the collective is the underlying foundation and the individual human being is its highest manifestation. The collective is ever seeking its consummation in the individual. As Tagore summed it up "You without me, I without you are nothing".[5]

Vedic sages realized the overarching presence of *rta*, an invisible cosmic law that held together in order a complex and adaptive system at different levels, forms, and phases of all the objects and processes that comprised the cosmos. All the forms of being existing and developing in harmony within an interconnected web of relationships were seen as organized in a system which integrated all the parts into an undivided whole in flowing movement. The cosmic order which extended to all levels of existence from the infinite to the infinitesimal was seen as inviolable, never to be broken, even by the Vedic divinities who were in fact considered as the guardians of *ṛta*.[6]

The Rgvedic concept of *rta* is one of cosmic order: all the various aspects of nature, visible and invisible, work together in concerted action, whether consciously or unconsciously, towards establishing in all the spheres of manifested existence a perfect

[4] RV, 1.164.4-5.
[5] Tagore, 113).
[6] Menski, p.90.

wholeness, ordered activity, oneness, the reflection of the Transcendent. At the human level the establishment of orderly conduct and harmonious relationships in society is man's attunement to the cosmic order. Such relationships imply a common order of ethics, justice and law, acceptable to all.

There are a several hymns in the Vedas with expressions of overwhelming power and victorious might to restore order. These hymns call upon Indra, Agni, and a series of gods and other powers to destroy all manner of threats to the social and cultural system, in all manner of creative ways. In the course of the hymns the focus shifts from exclusive concentration on gods to warriors and the inspiration of Indra's model for the society to perform proactively in battle. While gods are first addressed in the verses, it is in the application of their behavior to that of men and the transference of their skills and courage to them that its realism comes to the fore.

About the battles and the response towards enemies the Vedas say, "May Indra aid us when our flags are out; may our arms be victorious. May our brave warriors come home with flying colors and protect us in the din of battle. Confusing the minds of our enemies, seizing their bodies. Attack them, confound them. Let our foes abide in utter darkness. We do not hate the conquered enemy; may we enjoy peace and security. Whosoever with an unholy mind tries to injure us, bragging about his might among princes, let not his deadly blow reach us. May we humble the wrath of the boastful miscreant".[7]

A long hymn in Rg Veda calls upon several gods like Agni and Indra to destroy all threats to the social and cultural system. "Let not the misguided rise and spread out, let them be subjected to justice and punishment. Let the sinner and the criminal, the supporter and admirer of sin and crime along with the sin and crime, and the tormentor of the good and innocent face the force of discipline, punishment, or elimination. Never compromise with the enemy of nature, divinity, humanity and the wisdom of humanity. Root out the man of hate and evil. For them, have the treatment they deserve and either correct them or eliminate them. Punish the evil doer so that by reason of that punishment no one again may raise his head for evil doing. Use your full powers with patience, fortitude and courage. You righteous passion should be for the destruction of evil and sabotage against life and social harmony". [8]

From heaven and earth bring righteous laws of punishment and correction against sin and crime, and against the supporters of sin and crime as well as against sympathisers with injustice and evil. Give incentive and encouragement for the righteous, and fearsome prohibitions for the adamant evil so that you nip and bury rising crime and evil in the bud. With power and force, look all round, search for the criminals and use

[7] Nikhilananda, p. 221.
[8] RV 7/104, 1-3.

your weapons of defence and offence, and with fiery, thunder-tipped, fatally destructive, irresistible and inviolable weapons fix the voracious enemies. Strike them on the rise and crush them into dust, sending them into silence and oblivion without uttering a sigh of pain or voice of protest.[9]

It also asks for vigilance against the enemies and their prompt destruction, "Let us be watchful and alert against the malignant, evil and treacherous forces, and ward them off and eliminate them with the fastest interception and destruction at the very outset. Let there be no peace for the evil doer whoever any time may try to injure, sabotage or enslave us out of jealousy, malignity or enmity".[10]

Attacks on our social system through misinformation are to be repulsed effectively and decisively, "If there are those who intentionally malign, and defame the man of purity, truth and immaculate honour and spotless reputation, or with their powers and prestige denigrate the man of goodness and charitable action and bring disgrace upon him, deliver such men to the isolation of darkness. Whoever injures or impairs vigour and power of our social system, let such an enemy, the saboteur, be reduced to nullity and himself suffer debility of body and even deprivation from self-extension and further growth".[11]

The fight is against forces of truth, order and harmony, both external and internal, "destroy the evil and the wicked and also the one who speaks the untruth, since both the evil and the liar end up in the bonds of Indra, the god of justice and power. If I were a sinner on the move, and if I troubled any person in life, then let me suffer death today just now. But I am not such, nor have I done so. Whoever says that I am a devil even though I am not a devil, and whoever says that he is innocent even though he is a sinner, may Indra, god of power and justice, punish such a person with his mighty vajra. May such a liar fall to the deepest darkness as the worst of all living beings".[12]

The social organisations are asked to be vigilant and active to keenly look for the forces of evil and violence, and then, bring to justice all those who disrupt the divine yajnas of solidarity and collective effort for creative work and advancement. "Forces of power and justice, from the light of heaven and wisdom of the sages, may seize the wicked and the destroyers and punish them with the vajra of justice and correction, tempered with help for peace and progress to enlighten the noble people dedicated to harmony and happiness".[13]

Indra, the commander of power and force, is asked to sharpen *vajra,* his weapon of justice and punishment for the crafty saboteurs on the lurk and strike the fatal blow.

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[9] Ibid. 7/104, 4,5.
[10] Ibid. 7/104, 7.
[11] Ibid. 7/104, 9-10
[12] Ibid. 7/104, 15-16
[13] Ibid. 7/104, 18-19

"His power throws off the saboteurs who damage the social and cultural system of peace and progress of the human community. He is mighty powerful like what the axe is for the wood, breaking down the evil and wicked destroyers like pots of clay whenever they raise their head".[14]

The concluding verse of the hymn calls for united action to decimate the wicked enemy. "We should crush the evil and the wicked like pieces of clay with a stone. They are covert, stealthy, clever, jealous and growling, cruel, cunning and voracious destroyers. Let not wicked demonic forces harm and destroy us. Repulse the darkness of oppressors harming us either by joint force or by sowing dissension. May the earth protect us against earthly sin and crime. Let the sky protect us against dangers from above. We should stay awake and watch everything that happens and strike the sinful destroyers, and shoot the vajra upon the covert saboteurs".[15]

These numerous references to punishment in the Vedas recognize the following fundamental elements of dandaniti:

(a) a standard of morality of which any violation warrants punitive retribution;

(b) the possibility of its violation which is considered as immoral;

(c) answerability for the violation which determines the guilt of the accused;

(d) degrees of guilt as determining the forms and severities of punishment; and

(e) authorized forms in which punishments may justly be administered.

Even in its remotest sources in the Vedas, dandaniti bears signs of being distinctly contextual and adaptive taking into account the varying conditions of time and place. This progressive nature of dandaniti was further elaborated and made more nuanced in the epics*, arthasastra*, and the *dharmasastra*.

Righteous War

Mahabharata is replete with references to dandaniti as forming an essential part of royal policy. There is never a doubt entertained in Mahabharata as to the efficacy of punishment in creating and maintaining social order. Its source is divine, its study and cultivation a primary duty of the ruler, and its application by the ruler is to be guided and controlled by definite principles. Prominent among these is the principle that penal law is to be closely controlled by considerations of social good. Punishment is divested of its character of mere afflictiveness and stands for the means of ensuring the safety of society and individual. Its object is not to inflict pain but to eradicate evil. From the Vedic days onwards the state stood guarantee for social environment conducive for individual self-realisation.

[14] Ibid. 7/104, 20-22
[15] Ibid. 7/104, 23-25

Mahabharata considers *dandaniti* or dandaniti as essential for the realisation of three objectives of dharma, artha, and kama. Dandaniti is based on wisdom and has emerged from the Sarasvati. With the use of the punishment, this policy protects the worlds. It rewards dharma and punishes adharma around the world. It is known as *dandaniti* or dandaniti and the worlds follow it. In the extensive corpus of learning in dandaniti, the means of protecting oneself against aides, protecting oneself against rivals, the use of spies and other methods and the use of secret agents are separately indicated. All the techniques of *sama, dana, danda, bheda* and the fifth one of *upeksha* are completely laid down. All the secret methods of creating dissension have been described, and also when these secret methods may fail and recourse to war will be necessary.[16]

To avert the fratricidal war conciliation was used first to prevent dissension in the family of the Kurus and ensure the welfare of the subjects. When peace was not acceptable, through eloquence and counsel efforts were made to create disunity among the kings so that a division could be created and the objective of avoiding war could be achieved. Finally, an offer was made of giving up the claim for entire kingdom in return for just five villages. When even this offer for peace was not acceptable and Duryodhana was not willing to give up the kingdom without a war, the last resort of punishment was chosen. The Pandavas were left with no option except to do what was appropriate under the circumstances.[17]

No account of dandaniti in the Vedic tradition can fail to notice the *Arthasastra* of Kautilya. The connotation of *Arthasastra* is of *dandaniti* or dandaniti. This work is veritable reservoir of pragmatic rules relating to suppression of criminals; conduct of war; secret practices; and foreign policy.

The guiding principles which governed the Kautilyan policy on war were:

(i) The ruler shall augment his resources and power in order to ensure the security of the state;

(ii) In case of conflict all resources and power are to be used to eliminate the enemy;

(iii) All states who help in the augmentation of power are friends;

(iv) a prudent course is to prefer peace and use war as a last resort; and

(vi) state policy in victory and in retreat must be balanced as the situation will never be certain and strength will always be a determinant of security.[18]

[16] MB 12.59-77.
[17] MB, 3.150.
[18] Arthasastra, 6.2

Institutionalisation of Punishment

While antecedents of dandaniti can be traced to the Vedas, Mahabharata and Arthasatra, its institutionalisation can be seen clearly in the Dharmasastra. Legal institutions indicate a shift in emphasis from self-discipline to enforced discipline. Gradually, the centre of gravity of conforming to the cosmic order moved from individual duties to institutional handling of dandaniti as a major instrument of justice. While self-discipline remained the bed rock of social order, enforcement of dandaniti became necessary to deter violations.

The Dharmasastra texts are the products of different and widely separated ages from around 500 B.C. to 500 A.D.[19] A few of them are very ancient and were composed more than two thousand five hundred years ago. Such are the Dharmasutras of Gautama, Apastamba, and Baudhayana, and the *Manusmrti*. These were followed by such Dharmasastra texts as the those of *Yajnavalkya*, Parasara, Narada. All these smrtis are not equal in authority. If we are to judge of the authority of a text by the commentaries thereon, then the *Manusmrti* stands pre-eminent. Next to it is the *Yajnavalkya*smrti. [20]

There is diversity of views between and within the Dharmasastra. These apparent contradictions result from different meanings of Dharma in different situations. The contextuality of Dharma makes it possible to prescribe a series of different rules, for different places and times for the same person. For instance, false evidence given by a witness can lead him to darkness of hell.[21] Sometimes, false evidence becomes a divine assertion.[22] Similarly, he who commits violence is regarded as the worst offender,[23] but the one who strikes in the cause of right incurs no sin.[24] Also, one should forsake wealth and desires, if it violates Dharma, but even Dharma if it is inhumane or may cause suffering in future.[25] Dharmasastra is to be obeyed for the sake of human wellbeing not for its own sake.

Smrtis, as the very name implies, are law-books written down from memory, bringing together therein, in more intelligible language, and within a smaller compass, all the teachings that lay scattered through the vast literature of the Veda.[26]

Smrtis mark the second stage in the development of Hindu Law. As the community expanded and inhabited diverse and remote tracts of the land. This gave rise to a large number of *Smrtis* being compiled and promulgated side by side in different parts of

[19] Kane, I, 304.
[20] Ibid., I, 306
[21] Manusmriti 8.94.
[22] Ibid., 8.103.
[23] Ibid. 8.345
[24] Ibid. 8.349.
[25] Ibid. 4.176
[26] Jha, p.3.

the country to suit the needs and conditions of the several peoples. This may be one of the reasons for the view held by later writers that all *Smrtis* are equally and universally binding.[27]

This same adaptability is also shown by the fact that while every *Smrti* deals in the main with what the author regards as perfect or ideal dharma, it always has a section dealing with what has been called 'apaddharma,' or Dharma during difficulties wherein the peculiar circumstances of the man are fully considered and his duties laid down in accordance with them. Manu himself has a section on 'Apaddharma' [28]

Coming to the later Nibandhas or Digests, we find that these also bear ample testimony to the spirit of selection and adaptability. They are quite free in admitting or rejecting the authority of the original Smirti, or even Shruti texts; when they do not find a certain text suitable to their theme, they try to explain it away in various ways.

From the above it is clear that the centre of gravity of authority, which originally rested entirely in the Shruti, gradually shifted from Shruti to Smrti, from Smrti to custom, and finally to the writings of a few learned and very modern authors. All this points to the fact that in the domain of Law, there has all along been a progressive spirit at work. That this is not a mere conjecture, but a fact recognised in the highest circles of society in this country, is proved by the declaration of Parashara to the effect that "The dharmas for men in the Satayuga are other than those in the Treta and the Dvapara; and in the Kaliyuga also they are different -the Dharma of each Yuga being in keeping with the distinctive character of that age."[29]

Similar declaration is found in Manu, with this important variation that instead of saying that "the Dharma of each Yuga is in keeping with the distinctive character of that age," he says that "the difference in Dharma is due to the gradual decay evinced in the character of the people of each age." *Viramitrodaya* explains this to mean that the Dharmas peculiar to each Yuga differ on account of the difference in the capacities of the men called upon to observe those Dharmas. "The Dharmas for the Satyayuga are those prescribed by Manu ; for the Treta those by Gautama : for the Dvapara those by Shankha-Likhita ; and for the Kali those by Parashara."[30] This view is supported by Baudhayana, who says — One should perform the necessary duties, so far as he is capable of doing and also the Kurmapnrana — 'One should perform his duties in accordance with one's capacity.'

In view of such contextual differences in the application of Dharma, rational interpretation of Dharmasastra is suggested. Manusmriti says that if a man explores, by reason, the Vedic teaching regarding Dharma, he alone, and no other, understands

[27] Ibid..
[28] Ibid. p.7.
[29] ibid. p.62
[30] Ibid. p.63.

Dharma.[31] Brihaspatismriti categorically rules that if a decision is arrived at without reasoning and considering the circumstances of the case, there is violation of dharma.[32] Naradasmriti says that it becomes necessary to a adopt a method founded on reasoning, because social context decides everything and overrides the sacred law.[33] Arthasastra also says that if sastra comes in conflict with any rational and equitable ruling then the latter shall be the deciding factor beyond the letter of the text.[34]

Thus, Dharmasastra is thus not a closed discourse that has no place for correction, adaptation, or innovation on contextual and rational basis. Rather, openness, creativity and an adaptive response to emergent social problems and circumstances is built into the very structure of not only Dharmasastra but also Arthasastra and Nitisastra. Multiplicity and contingent nature of views expressed in different Dharmashastras helped contextual application of plurality-conscious universalistic principles. The Dharmasastras are essentially "rules of interdependence" founded on diversity and unity corresponding to the nature of things and necessary for the maintenance of the cosmic and social order.[35]

Institutionalisation of dandaniti, especially that relating to legal procedure, advanced dramatically during the period of the Gupta empire. This period appears to have been a golden age of institutionalisation of dandaniti. From the many texts that may have been produced during this time, only two are preserved in the manuscript tradition, those ascribed to Yajnavalkya and Narada. Only fragments of the t wo other major texts, those of Brihaspati and Katyayana, which also demonstrate clear advances in legal thought especially with respect to legal procedure, are available in the form of citations in medieval legal digests. In spite of the advances made by these authors, they remained indebted to the two scholars who lived several centuries before them: Kautilya and Manu. Many of the texts produced during the Gupta period can be viewed as commentaries on and developments of their legal thought.

In the matter of the method of settlement of disputes, the four aspects of a lawsuit (metaphorically called the four “legs” or pillars), that reflected both procedure and source, according to the *Naradasmriti* are — virtue (dharma), that is the settlement of dispute on the basis of acceptance of truth by both the parties; judicial proceeding (vyavahara :), that is the contested ascertainment of right; the evidence of custom (caritra), that is the practice and usage of the locality; and a verdict from the king (rajasasana), that is the king’s proclamation in accordance with dharma].[36]

[31] Manusmriti, 12.106.
[32] Brihaspatismrti, 2.12.
[33] Naradasmriti, 1.40.
[34] Arthasastra, 3. 1.45.
[35] Ibid. p.216.
[36] Naradsmriti, 1.8.

The king's role remains central in all aspects of institutionalisation of dandaniti. He approves and notifies the Constitution of the Court, Rules of Evidence, Gradation of law Courts, Validity of Law Suits, People qualified to be Witnesses, Testimony of Witnesses; Assessing the Testimony; False Witnesses; Documentary Evidence; Principles of Jurisprudence; Delay in Court proceedings; Judicial examination; Verdict; Assessment of Evidence; Lawsuits Without Witnesses; Wrong behaviour on the part of Witnesses; Swearing in of Witnesses; Prayashchit; Confession.

There was broad-based variety of adjudicative forums with appropriate hierarchy and supervision and linked to specific communities so that punishment was administered in the suitable socio-cultural atmosphere of the parties. People's court system and assistance by assessors or jurors had tremendous dynamism that had never posed the problem of judicial delay. Collegiate adjudicative system and assistance of experts in the field of law, technicality and accounts reflected inbuilt safeguards to avoid errors. Humane but stern treatment of witnesses and parties fairly mixed compassion with justice.

The prevalence of a variety of courts at various levels was the distinctive feature of the ancient Indian legal system, matching diversity and flexibility in the source of law. There was bifurcation between courts which decided vyaavahaarika (civil) disputes and aparaadhika (criminal) disputes. Those which are omitted in the lists are covered under the title prakirnaka (miscellaneous). All the matters were to be decided in accordance with dharma (law) and local customs and usages. The king's orders not in conflict with dharma can also be a source.

There was a hierarchy of courts as follows: The court presided by the king was the highest court. There were also courts appointed (adhikrita) by the king, presided by the chief justice (pradvivaka). Next to them came in the descending order gana (assembly), shreni (corporation) and kula (family councils). The Brihaspatismriti classifies courts as shaasita (where the king himself presided), mudrita (appointed by the king and using the king's seal), apratishtitha (circuit court) and pratisthita (established in village or town).

According to *Smritichandrika*, a commentary on the Manusmriti, the kula should consist of impartial persons belonging to the family or caste of the litigants, functioning (like a present-day panchayat) to decide disputes amongst the persons belonging to the same family or caste; shreni should consist of a guild or corporation of persons following the same craft, profession or trade; and gana or puga should be an assembly of persons belonging to the same dwelling place but might be belonging to different castes or following different avocations. [37]

[37] Courts of India, p.37.

In addition, there were practices of resolving disputes through arbitrators or madhyasthas. The Smritis of Manu, Narada and Brihaspati suggest that disputes regarding landed property or boundaries should be decided by neighbours, the inhabitants of the town or village, the other members of the same community and the senior inhabitants of the district. According to the Naradasmriti , "In disputes among merchants, artisans or the like persons and in disputes concerning persons subsisting by agriculture or as dyers, it is impossible for outsiders to pass a sentence and the passing of the sentence must, therefore, be entrusted to persons acquainted with such matters in a cause of this sort".[38]

The family, the guild, and the corporation, fully approved of by the king, decided most of the cases concerning their members, other than those cases relating to grave crimes. Any matter, not coming within the purview of the knowledge of the family guild, or corporation, was to be finally decided by the supervisors, appointed by the king. They were superior in power to the family etc. and the judge superseded the supervisors. Of the family, the guild, the corporation, the supervisors, the judge and the king, the next ones are successively higher in judicial authority than the preceding ones.

Regarding jurisdiction the position was that kula, shreni and gana could decide all disputes except those falling under saahasa. They had no power of imposing corporal punishments and fines. The appellate jurisdiction of gana over shreni and shreni over kula was recognised. The king was the highest court of appeal and his decision was final.

All the courts were collegiate in their functioning. While the king was recognised as a fountain of justice, the Smritis had prohibited him from acting alone in the task of the administration of justice. The collegiate character of the king's court is explicit from Brihaspati 's verse to the effect that king (raja), chief justice (pradvivaka) and judges (sabhyas) are the judicial officers. Shastras contemplated that the king should adjudicate in consultation with the chief justice and puisne judges, although personally responsible for his decision. There was a right of appeal to the king as the last resort.61 According to the Naradasmriti , the king should act in accordance with the opinion of the chief justice.

The villagers had a judicial system of their own at once familiar to and respected by them; the various traders and guilds had a similar system. The presiding officer of the popular courts or guild courts had office either by election or inheritance according to local custom. With him were associated three or five men. In these apparently private courts were settled the affairs of the everyday life. In case of grave crimes or when the condemned party refused to obey the judgment of the local court, the court of the king was concerned with litigation.

[38] Ibid.

Another dimension of the collegiate decision making is the participation of experts in assessing the disputed question of facts. Vyasa has observed that in case of disputes among traders, craftsman, artisans and artists, it is difficult for the courts to arrive at correct decisions in view of the technical problems involved. Hence, experts in the concerned field should be taken as assessors for deciding disputed questions of fact. The Katyayanasmriti states that a few merchants belonging to a guild, who come from good families, bear good character and conduct, who are well advanced in age and free from malice, should be appointed to assist the court in deciding the disputes.

Rule of Law

Manusmriti considers dandaniti to be a tremendous force for discipline, hard to be controlled by persons with undisciplined minds, it destroys the King who has swerved from duty, along with his relatives. Then it will afflict his fortress and kingdom, the world along with movable and immovable things, as also the sages and the gods inhabiting the heavenly regions. Therefore punishment shall be given appropriately to men who act unlawfully, after having carefully considered the time and place, as also the strength and learning of the accused. When meted out properly after due investigation, punishment makes all people disciplined and happy; but when meted out without due investigation, it destroys all things.[39]

Dandaniti cannot be justly administered by one whose mind is not disciplined, or who is addicted to sensual objects, or who is demented, or who is avaricious, or whose mind is not disciplined, or who is addicted to sensual objects. Discipline can be administered by one who is pure, who is true to his word, who acts according to the Law, who has good assistants and is wise. The King who metes out punishment in the proper manner prospers in respect of his three aims of virtue, wealth, and pleasure; he who is blinded by affection, unfair, or mean is destroyed by that same punishment.[40]

The qualification of the chief justice and judges there were based on sound principles. A person was required to be well versed in the 18 titles of law and their and proficient in logic, interpretation. Knowledge of Vedas and Smritis capacity to extract the truth from the judicial proceedings by application of the dharma. The members of the court should not connive with the king when he begins to act unjustly. If they do so, they, along with the king, fall head down into hell. Judges who agree with the king when he proceeds in an unjust manner become party to the sin flowing from the unjust decision.

Having duly ascertained the motive and the time and place, and having taken into consideration the condition of the accused and the nature of the offence, punishment should be given to those deserving punishment. Unjust punishment is destructive of

[39] Manusmriti, 7.29.
[40] Ibid. 7.30.

reputation among men and subversive of fame; in the other world also it leads to loss of heaven; he shall therefore avoid it. The king, punishing those who do not deserve to be punished, and not punishing those who deserve to be punished, attains great illfame and goes to hell. The message is very clear, virtue lies in action. Mere words and principles, without insightful action are sure to lead to individual and social degeneration.[41]

A person who knows the Vedic treatise is entitled to become the chief of the army, the king, the arbiter of punishment, and the ruler of the whole world. As a fire, when it has picked up strength, burns up even green trees, so a man who knows the Veda burns up his taints resulting from action. A man who knows the true meaning of the vedic treatise, in whatever order of life he may live, becomes fit for becoming Brahman while he is still in this world.[42]

Those who rely on books are better than the ignorant; those who carry them in their memory are better than those who simply rely on books; those who understand are better than those who simply carry them in their memory; and those who resolutely follow them are better than those who only understand.[43]

Perception, inference, and treatises coming from diverse sources—a man who seeks accuracy with respect to the Law must have a complete understanding of these three. The man who scrutinizes the record of the seers and the teachings of the Law by means of logical reasoning not inconsistent with the Vedic treatise—he alone knows the Law, and no one else.[44]

The principle of proportionality, which was assisted by good counselling and appreciation of facts, was crucial in giving punishment, fixing of fines or considering extenuating circumstance. Similarly, by affirming strongly that in case of doubt punishment will not be imposed, the legal system exhibited great wisdom. The king's duty to act with a sense of proportion in the matter of imposition of punishments shows the link between justice and equity.

The dharmasastra mention the upper and the lower limits of the punishments. The first, medium and highest levels of punishment are mentioned, and the actual punishment imposed has to be limited within the minimum and the maximum laid down in the texts. The reasons for variations are composed of following five components; Exemption, extenuation, infliction according the prescription, aggravation, and consideration of cumulation, commutation, and other reasons.

[41]Manusmriti, 8.126-131.
[42] Ibid. 12.100-2
[43] Ibid. 12.103
[44] Ibid. 12.105-6

Among the factors to be considered while inflicting punishment the caste of the offender, knowledge of the offender, his financial condition, age, place, time, and the value of the damage caused were included. All the considerations were collectively taken into account while deciding on punishment.

For instance, the punishment for theft committed by a knowledgeable Sudra was generally eight times the value of the thing stolen and it increased twice for the learned members of the successive higher varnas. Manusmriti says that it becomes increased sixteen times, thirty-two time and sicty four times in case of a Vaisya, a Ksatriya and a Brahamana offender respectively. The punishment could go up to one hundred times or one hundred twenty-eight times in case of the theft having been committed by a Brahaman who knows the unrighteousness of his actions. Thus commission of an offence by brahmana who is fully aware of the unlawful character of the act becomes a reason for the enhancement of his punishment.

Interestingly, Manusmriti also says that someone who had stolen gold becomes instantly pure by quietly repeating once the *Asyavamiya sukta* and the *Sivasankalpa sukta*.[45] *Asyavamiya sukta* in the Rg Veda is one the most philosophical and intriguing sukta of the Vedas and it contains several fundamental principles of the Vedic knowledge tradition which are repeatedly mentioned in the Vedas, Upanisads, and the dharmasastra. Knowledge of this *sukta* by an offender was considered an effective *prayashchit* for the sin committed. Brihaspatismriti says that gradation of fines was subject to modification inconformity with the nature of the offender, and it could be retained as declared or reduced or raised.[46]

This approach of transcending the letter of the law in the light of the spirit of justice reflects the functional character of dandaniti aiming at a benevolent result for both the individual and the society. It reflects the limitation of man made regulations and a notion of higher moral law as the superior principle. The larger discretion in the interests of justice gave scope for application of equity and good conscience.

Freedom through Law

In the Vedic tradition, creation of order in society facilitates the creation of freedom for the individual. Instead of making autonomy as the foundation of social life, Indian tradition makes order as the foundation of social and individual life. The concept of punishment is inherent in the rules that establish order and hold the society and state together. No punishment, no society, no society no state. Dandaniti is based on rules that integrate the individual, family, society and state.

In the *dharmasastra* the existence of conflicts, disunions, rivalry and factional spirit is considered to be the greatest of all dangers to social cohesion and individual

[45] Manusmriti, 11.251
[46] Brihspatismriti, 20.15.

freedom. The bond of civil society is torn asunder when the moral system is disrupted. Hence the greatest political offender and the most criminal sinner is he who by his conduct promotes the breach between those who should normally live in amity and peace. The general violence of criminal activity is seen in dharmasastra the most insidious threat to the order of law.

The dharmasastra consider the main problem with unlawful violence as the threat it poses to the state or other legal authority and the injury it causes to individual persons or groups. Dharmasastra provide for action against such offences by the decree issued by the king.[47] According to the dictates of the dharmasastra the execution of bad men is real ahimsa i.e., mercy. One is deserted by good people and acquires sins by always not punishing those who ought to be punished, and punishing those who ought not to be, and by being a severe punisher.[48]

A state is considered as a state only because it can coerce, restrain, and compel. Eliminate control or the coercive element from social life, and the state as an entity vanishes. Dandaniti is the very essence of social relations. No dandaniti means no state. A powerless state is a contradiction in terms. The absence of dandaniti is tantamount to rule of jungle or the state of nature. It is clear also that property and dharma do not exist in that non-state. These entities can have their roots only in the state. The whole theory thus consists of three fundamental rules : no dandaniti or sengol, no state; no state, no dharma; and no dharma, no individuality and property.[49]

In fact, dandaniti in this view is what makes law practical at all as it contains a recognition of human imperfection and fallibility. Law in its fullest sense can only exist in the world if dandaniti is there to correct the inevitable failings of human beings. Without dandaniti, law remains an elusive ideal to which no one can aspire. With dandaniti law becomes satya, the truth that upholds social and individual righteousness. Dandaniti simultaneously guarantees the overall stability of the social system and development of the individual.

Dharmasastra consider dandaniti as a double edged sword that cuts both ways. On the one hand it is a corrective of social abuses, a moralizer purifier and civilizing agent. It is by the administration of dandaniti that the State can be saved from a reversion to matsyanyaya and utter annihilation and it is by dandaniti the people are set on the right path and they become virtuous and refrain from committing aggression or indulging in untruths. Dandaniti is efficacious moreover in causing the cruel to become mild and the wicked to give up wickedness.

[47] Sukraniti, p. 40.
[48] ibid. p. 131.
[49] Sarkar, Political Institutions, p. 197

It is good also for leaders and can bring them to their senses should they happen to be addicted to an extra dose of vanity or unmindful of their own vocations. Finally, it is the foundation of civic life, being the 'great stay of all virtues' and all the 'methods and means of statecraft' would be fruitless without a judicious exercise of dandaniti. Its use as a beneficent agency in social and individual life is therefore unequivocally recommended by Sukra.[50]

But on the other hand, dandaniti is also a most potent instrument of control the ruler himself. The misuse of dandaniti leads to the fall and destruction of the ruler. Manu does not hesitate to declare that dandaniti would hit the king who deviates from his duty from his 'station in life'. It would destroy his relatives too together with his territories and possessions.[51] The common good depends therefore on the proper exercise of the dandaniti. Manu would not allow any ignorant man to be the administrator of dandaniti. The greatest amount of wisdom accruing from the help of advisers and others is held to be the essential precondition for the handling of this instrument. And here is available the practical check on the absolutism of the dandadhara in the Indian tradition.[52]

The Vedic tradition sets forth the discipline by which all parts of cosmic and human nature, the body mind and spirit, are controlled and integrated so as to allow the free and creative working of the universal spirit of which all these are the developments. Cosmic and human nature is a system of interdependent relationships, and the first principle of the universe is that it possesses unity, consciousness and priority of existence. The ultimate creative energy of the universe is one and not many, and nature is too closely knit to be viewed as a scene of conflict between two or more powers. This orderedness expresses itself in different forms of determination according the level of consciousness that had been attained by a person. Work, knowledge and devotion are complementary both when social cohesion and individual freedom is the goal and after it is attained. [53]

In dandaniti we encounter on the one side interests of the society and on the other individual morality, virtue, dharma, etc. In fact, it is to 'educate' man out of the primitive licence and beastly freedom that government has been instituted. The society and state is designed to correct human vices or restrain them and open out the avenues to a fuller and higher life. And all this is possible only because of dandaniti. The conception of this eternal co-relation in societal existence is one of the profoundest contributions of the political philosophy of the Hindus to human thought.

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[50] Sarkar, Basic Ideas, p. 513-14
[51] Mausmriti, 7.28-29
[52] Ibid. 7.30.
[53] Radhakrishnan, 2012, p. 321.

The concept of dandaniti in the Vedic tradition changes the emphasis from what law restrains to what law enables. It suggests that every social system must contain morals and ethical elements which can be understood in practical terms.[54] "In accordance with the doctrine of dandaniti, the state is conceived as an educational institution or moral laboratory. It is an organization in and through which men's anti social tendencies are curbed, and it thereby becomes an effective means to the general advance of mankind. The Indian thinkers therefore consider the state to be an institution necessary to the human race if man is not to suffer in the condition of rule of jungle under the might of beasts. Man, if he is to be man, cannot do without social and political organization".[55]

[54] Sarkar, Political Institutions, p.203
[55] Ibid.

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The Concept of *Danda* in the *Dharmasastra*

A Unifying View of Spirit and Force of *Dharma* in Indian Tradition

Sunil Sondhi

Abstract

Manusmriti, in one of the references to danda, gives specifications for making a wooden stick for the Upanayan ceremony. This ceremony marks the initiation of a child's journey of learning. The danda is to be made of sacred wood of specific length from trees like Palash, Nyagrodha, or Asvattha, which represent different aspects of the cosmic order maintained by Brahma, Vishnu and Mahesh. The sacred wood should not be twisted, it should not have knots or burn marks, should look good and not cause hurt. The danda as a symbol of discipline is considered necessary for the pursuit of righteousness, and also for protection from threats to righteousness. The child carries the danda as he starts the journey of learning with symbolic bhiksa, or seeking alms, not for himself, but for his teacher. Bhiksha serves to instill in him the values of humility and self-control and a sense of responsibility towards the teacher and the society.

The idea of legal culture has had an important place in major recent debates about the nature and aims of law. The concept of legal culture means that law should be treated as embedded in the broader culture of society. In a sense, law is culture. Concept of legal culture encompasses much more than the professional juristic realm. It refers to a more general consciousness or experience of law that is widely shared by those who constitute a nation. Culture is fundamental — a kind of lens through which all aspects of law must be perceived, or a gateway of understanding through which we must pass so as to have any genuine access to the meaning of law in society.

Cultural concepts of law that emerge out of the several frames of reference in the dharmasastra, the republican governments in ancient India, and the constituent assembly debates enable us to view the law in India in an integrative perspective that is closer to Indian cultural tradition. The innovative value of historical and sociological approach lies in its unifying vision of the theological, cultural and positivist aspects of the concepts of law in Indian tradition.

A holistic concept of law including both ethical and legal perspectives seems to provide a more realistic picture of Indian legal culture. A juridical system that does not correspond to the social and cultural sensitivities of a society can not be owned by the people as their system but will be seen as something foreign and imposed. Without a conducive social and cultural conceptualization mere formal law cannot create willing legal and moral obligation.

Introduction

In the context of Indian knowledge tradition, there has been no misunderstanding more serious in nature than the supposition that Indian culture was fundamentally 'religious', in the sense in which the words 'religion' and 'religious' have been used in the West for centuries. These imply a belief in one exclusive God as the creator of the universe, an exclusive book containing the life and the sayings of that messenger of God, a separate code of commandments, a conclusive corpus of ecclesiastical laws to regulate thought and behaviour in the light of these, and a hierarchy of priesthood to supervise that regulation and control and promote proselytization.

The Indian concept of *dharma* means none of these. It is to this confusion that we can trace most of the Western misconceptions of Indian society, culture and law. Many of Indian political and legal institutions continue to be founded upon such misconceptions which are often the source of the social and political problems that the people of India face today. The assumptions underlying Western law and jurisprudence at different stages of its development were radically different from the assumptions of traditional Indian law and jurisprudence. But it was the Western political and legal philosophy founded on the rights of the individual that dominated the constitution-making in India. The divorce of the Indian people from Indian law jurisprudence has proved harmful for social cohesion in the country.

Dharma means much more than what is commonly understood by religion. While there is something in the very nature of semitic religion which is divisive, conclusive and exclusive, *dharma* is inclusive, open and it unites. Religion excludes all that it is not in a particular religion, *dharma* includes every form and view of life. Religion often makes claims that are not based on experience, the claims of *dharma* are the claims of life and science. Religion and politics must necessarily be separated for a safe and sane world, legal and political thought and practice must necessarily have its basis in *dharma*.

Dharma provides comprehensive guidance to regulate human conduct in accordance with the given system of cosmic creation and fulfill the purpose of one's life. The whole life of a person, considered both as a an individual and as a member of social groups, as well as a person's relationship with fellow individuals, to the other living beings, to cosmic reality generally and to one's conceptions of God come within the purview of

the concept of dharma. Among the duties that it lays down are both self-regarding and other-regarding, those to the living, those yet to be born and those no longer alive.

As past, present and future are interconnected in Indian tradition, human relations too extend in time both backward and forward and to the whole environment. In the cosmic system of creation, large and small, and crucial and trivial are not determined according to human standards. A particle of sand on the sea shore is no less significant than the stars and galaxies in the space. So the small details of the *yagya* are as important as the details of everyday life, and the public and social relations, from the point of view of the purview of the *dharmasastra*.

Nature of *Dharma*

The first attempt to create a modern scientific theory in jurisprudence was the positivist theory of the English Jurists Bentham and Austin. Bentham and Austin utilized the positivist approach of Auguste Comte to the explore subject of jurisprudence. They insisted that one should study the law, including the legal structure, the legal concepts etc. as it is, and not how we would like it to be. This was the scientific approach because in science also we study objective phenomena as it is and not how we like it to be. For instance, when we study the atoms in physics we study the nucleus, the electrons orbiting around it, etc. We do not speculate how the atom should behave according to our own wishes, but we study it as it is. The same approach was adopted by Austin and Bentham in jurisprudence.[1]

Positivist jurisprudence regards law as a set of rules (or norms) enforced by the State. As long as the law is made by the competent authority after following the prescribed procedure it will be regarded as law, and we are not concerned with its goodness or badness. We may contrast this with the natural law theory which says that a bad law is not a law at all. "The science of jurisprudence" Austin says "is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness". Thus, positivism seeks to exclude value consideration from jurisprudence, and confines the task of the latter to analysis and systematization of the existing laws. The separation of law from ethics and religion was a great advance in Europe from the feudal era.[2]

There has been a general belief among both scholars and laymen that law is a special mechanism for establishing social order isolated from other social mechanisms and, for this reason, that the scientific study of law should be confined to the special capacity of positive legal jurisprudence. While positivism was a great advance over natural law and was suited to modern industrial society, it had a great defect that it only studied the form, structure, concepts etc. in a legal system. It was of the view that study of the social and economic conditions and the historical background which gave

[1] (Katju, p. 17).
[2] (Menski, p.6).

rise to the law was outside the scope of jurisprudence, and belonged to the field of sociology.[3]

However, unless we see the historical background and social and cultural circumstances which give rise to a law it is not possible to correctly understand it. Every law has a certain historical background and it is heavily conditioned by the social and cultural system prevailing in the country. The flaw in positivism therefore was that it reduced jurisprudence to a merely descriptive science of a low theoretical order. There was no attempt by the positivist jurists, like in sociological jurisprudence, to study the historical and socio-cultural factors which gave rise to the law. Positivism reduced the jurisprudence to a very narrow and dry subject which was cut-off from the historical and social realities. Thus it deprived the subject of jurisprudence of flesh and blood.[4]

The cultural relativism approach that emerged in social sciences in the twentieth century in the wake of Einstein's theory of relativity, and the uncertainty principle of Werner Heisenberg, argues that a society's beliefs and practices should be understood based on that society's own culture. Edward Sapir and Benjamin Whorf, major proponents of cultural relativism, argue that the norms and values of one culture should not be evaluated using the norms and values of the other. Another way of saying this is that many features of human experience are entrenched or embedded in cultural conceptualizations. Cultural relativism offers both a theoretical and an analytical framework for investigating cultural conceptualizations that underlie the social and cultural practices and institutions. At the heart of the theoretical framework of cultural relativism is the notion of cultural cognition, which affords an integrated understanding of the notions of "knowledge" and "culture" as they relate to social practices.

The popular negligence of the cultural factor of law may have been partly caused by the alleged universal nature of traditional jurisprudence, prevailing as in the western science of law in the world. Contemporary Western jurisprudence is indeed established on a universal basis. Its overwhelming prevalence in the world seems to leave little room either for serious consideration of its cultural specificity or for doubt as to its applicability to the different cultural specificities of other countries.

Contemporary Western jurisprudence is a product of long Western history and is coloured by a Western culture based on the Hellenistic and Christian view of man and society. The universalistic achievements of Western jurisprudence hides its cultural specificity. That specificity may have been in some cases diffused by or assimilated into different specificities of different cultures, but in other cases it has conflicted with or been rejected by them. In all cases, Western jurisprudence, convinced of its illusion of universality, does not pay due attention to the cultural problems which accompany

[3] (Chiba p.1)

[4] (Menski, p.12).

such diffusion or conflict between Western specificity and non-Western specificities.[5]

The point is that the whole structure of law of a people is not limited to the monistic system of state law as maintained by Western jurisprudence in accordance with methodological postulates of legal positivism. The whole structure of law as an aspect of culture includes all regulations, however apparently different from state law, which the people concerned observe as law in their cultural tradition, including value systems. The very cultural identity of a people demands that we include all of them in a whole structure. Thus, the whole structure of law is plural, consisting of different systems of law interacting with one another harmoniously or conflictingly.[6]

At the same time it is true that the peoples and scholars of non-Western countries who have cherished their own jurisprudence with specificities quite different from the Western, have not succeeded nor even attempted to present the achievements of their jurisprudence before the world circle of legal science forcibly enough to cause the proponents of Western jurisprudence to doubt their conviction of its universality. Without presenting the achievements of their own jurisprudence before world bodies specifically aimed at self-reflection of model jurisprudence, they would be disqualified from criticizing the ethnocentricity of the latter, as recently pointed out by some Western scholars.[7]

Such a negative or passive attitude may be another reason why Western jurisprudence has in general disregarded the jurisprudence of different cultures - jurisprudence with due respect to indigenous legal cultures in non-Western countries. Vital to the proper understanding of law in non-Western culture is, firstly, for scholars to present their own data and views positively in order not to negate the significance of western jurisprudence, but to maintain a sound understanding of its nature when utilized in different cultures.[8]

Many Western scholars and their Indian followers with their apemanship and parrotry, vigorously refuse to accept the indigenous identity of law in India, primarily because their assumptions about 'law' differ from the internal categories of *dharmic* law. The main problem that arises in connection with understanding *dharmic* law, has been the regular attempt – by insiders as well as outsiders - to deny that this important legal system actually has its own capacity for internal modernisation. *Dharmic* law is much more than state law and thus it explicitly rejects the usefulness of legal positivism as an analytical tool for understanding the actual complexity of *dharmic* law. The projected decline and virtual abolition of *dharmic law* is nothing but a constructed myth that has served certain purposes and modernist agenda – and continues to do so with much persuasion - but can not defeat the social, cultural and

[5] (Chiba, p.2).

[6] Chiba, p.4

[7] ibid. p.2

[8] ibid.

legal realities of over a billion Indians in India.

The assertion that law is simply the law of the sovereign State misses the point that the law gets its meaning from the intersection of legal and various other social systems of meaning. Law like any other institution of society is interconnected with other institutions. The task of legal scholars therefore, is to recognise the connections between the law and social, political and cultural systems. The interdisciplinary study of law must mean that it brings the knowledge of the legal doctrine and analyzes it in the context of the knowledge of other disciplines. In doing so it carries the responsibility to try and achieve social justice for all. Despite the never-ending debates about modernisation and secularism in India, *dharmic* law, governing the social majorities of India's population, has continued to play a key role in the development of the state legal apparatus and will continue to do so. It does not matter whether scholars like this or not.

Dharma, the foundation upon which all life is based in India, is immeasurably more than 'religion'; mistakenly one has been taken to be the other. The Indian mind did not think in terms of contesting polarities of the *either/or* kind. It would be yet another misunderstanding if the statement that *dharma is* profoundly secular is taken to mean that it is for that reason anti-religion, or that it has concern with other human beings in the form of legal accountability alone. The secular nature of *dharma* lies in the fact that all Indian explanations of man are evidently located in man himself, in the very structure of his being. It is that which binds one human being with another. The ethical foundations, and the limits of one human being's conduct towards another, are already inherent in man's being, in the force of *dharma*.

In modern times, when secularism is upheld as an ideal and religion has been separated from politics such a linkage may appear far-fetched. The Indian view is different. Morality, to have effective force in practice must be based on rules of cosmic order. The unruly conditions of the modern world could have been avoided if *dharmic* values had been upheld, and personal, social and national behavior had been harmonized with the complex adaptive system running through the history of cosmic creation. *Dharma* can be comprehended by its application in daily life, by the consideration of the diverse form it takes, by its effects both visible and invisible, the empirical evidence behind it, and and the occasion for its use and or application. *Dharma* stands for natural law, civil and moral law, justice, virtue, merit, duty, morality and quality.[9]

The study of *dharmic* law has been neglected in the decades since independence due to a combination of declining knowledge of its classical foundations and the pressures of modern political correctness, to the effect that studying *dharmic* law is often seen as a regressive activity. Anything 'Indian' is therefore quickly dismissed in many ways, by those who imagine and assert that a modern world, by which is often meant a

[9] Aiyangar, p.62

Western-inspired world, can do without so-called primitive religious and cultural traditions. They have conveniently forgotten that the so-called modern western traditions have their own roots in Western cultural and religious traditions. So how can India be called upon to 'modernise', if that means giving up the social and cultural concepts that make up the fabric of the Indian identity?

Since *dharmic* law has always been a reflection of the way of life of millions of very diverse people, what was abolished by the formal law was manifestly only a fragment of the entire field and of the social reality of *dharmic* law. The conceptual framework and the entire customary social structure of Indian culture, remained largely immune to the powerful wonder-drug of legal modernisation which had been administered in measured doses since well before 1947 and was again used during the 1950s and decades thereafter. Something as complex as Hindu personal law could not be reformed away and ultimately abolished by statute, nor could its influence as a legal normative order that permeates the entire socio-legal Indian field simply be legislated away. *Dharmic* law has always been a people's law, whether or not the state wished to see it that way. Despite enormous internal changes, *dharmic* law as a conceptual entity has remained an integral part of the living and lived experience of all Indians.

Spirit of *Dharma*

The Vedic texts give a reasonably clear picture of the world views of the Vedic sages, of their ideas about man's place in the world, in particular of the Vedic conceptualization of *ṛta* as macrocosmic order. Herein, then, lies the importance of the Vedas as a source of 'law' or rather of dharma. They elucidate the early conceptual underpinnings of Vedic law which are absolutely central for understanding the emerging legal system as a whole. The central point appears to be that 'law' is an entity beyond direct human control. It exists, and yet does not claim institutional loyalty, as a state legal system would do.

Vedic sages and scholars realized the overarching presence of *rta*, an invisible cosmic law that held together in order a complex and adaptive system at different levels, forms, and phases of all the objects and processes that comprised the cosmos. All the forms of being existing and developing in harmony within an interconnected web of relationships were seen as organized in a system which integrated all the parts into an undivided whole in flowing movement. The cosmic order which extended to all levels of existence from the infinite to the infinitesimal was seen as inviolable, never to be broken, even by the Vedic divinities who were in fact considered as the guardians of *ṛta*.[10]

This universal principle of creative order is revealed in some of the earliest stages in the evolution of multi-cellular life on this planet. A multitude of cells are bound together into a larger unit, not through aggregation, but through a marvelous quality

[10] Menski, p.90

of complex inter-relationship maintaining a perfect co-ordination of functions. The larger co-operative unit accommodates greater freedom of self-expression of individual units, to develop greater power and efficiency in the organised whole. It is not merely an aggregation, but an integrative inter-relationship, complex in character, with differences within of forms and function. There are gaps between the units, but they do not stop the binding force that permeates the whole or the dynamic identity of the units. The most perfect inward expression of such organization has been attained by man in his own body. But what is most important of all is the fact that man has also attained its realization in a more subtle body outside his physical system in the universe.[11]

Īśa Upaniṣad brings out the systemic aspect of cosmic order most succinctly and clearly. It says that the Absolute Reality is both universal and particular. The creation of the particular from the universal does not affect the integrity of the universal. The principle or quality of wholeness and integration is prior to the principle of particular and diversity. Oneness becomes many in the image of the oneness. That is whole, this is whole, taking out a particular whole from the absolute whole leaves the absolute whole integrated and creative as before. Every particular entity has to be an integrated whole to maintain its identity amongst an integrated system of infinite entities. The wholeness or integrity of each part is the bedrock of the wholeness of the universe and the order of the cosmos, and the order of the cosmos is the bedrock of the wholeness of the particular.

Ṛta is the principle whereby the Absolute Reality becomes manifest and perceptible to human senses. In *Ṛg Veda* it is said that, 'heaven and earth exist in close unison in the womb of *ṛta*'.[12] *Ṛta*, thus, is the one single system that embraces the cosmic order. The concept of *ṛta* explains the course of the evolution and sustenance of the natural and human world in terms of rhythm, time cycle, seasons, and biological growth. It refers to three basic elements of birth, growth, and transformation as the components of the complex cosmic system which functions according to its own self-organizing principles and law. Scholars, scientists, and poets in all ages have always found it amazing that the Absolute Reality is so well-ordered. In a landmark Supreme Court judgement, Chief Justice P. B. Gajendragadkar called this 'great world rhythm' one of the basic concepts of Hindu philosophy.[13]

The early key concept of *ṛta* metamorphosed gradually into *dharma* which may be understood as microcosmic order or duty, the central *dharmic* legal term, which in one form or another underlies and suffuses all the later texts. *Dharma* became clearly the core concept of Vedic tradition, and thus of Vedic law. Its relevance in legal terms can be explained quite simply in that life is seen as a complex experiential reality, in which everybody and everything has a role to play and is visibly and invisibly interconnected

[11] Tagore, 1931, p.2
[12] *Ṛg Veda,* 10.65
[13] 1966 SCR (3) 242

in a giant systemic network of cosmic dimensions, a kind of universal spider's web. Individual roles and obligations are, of necessity, quite disparate for different people; they depend on contextual factors like gender, age, or place in society. *Dharma* as a central legal concept thus suggests unlimited plurality at the level of social reality within a *dharmic* systems theory that defies rational deconstruction.

Ṛta is a multidimensional concept which is connected to other fundamental concepts like *brahma, atma, dharma, and satya,*in the *Veda,* Epics*, Upaniṣads* and the *Dharmaśāstra*. In its most fundamental sense*, ṛta* is the law, order, system, harmony underlying all natural phenomena. *Ṛta* is the all-pervasive universal order that is same at all levels of existence, and the objective world is the expression of that order. The field of *ṛta* is physical, mental, spiritual, and ethical. Nature as it is known to us is not seen as a chaotic occurrence of events and objects. While it may appear as random and disorganized, the fundamental processes of nature that underlie all objective, and subjective realms too, function as a complex system in which all parts are coordinated and integrated into a larger whole.

Indian conceptualizations of *ṛta, dharma, and satya* are not comparable with Western principles in the sense that they provide specific ethical permissions or prohibitions. Truth in the Western sense is the sum of what can be isolated and counted, it is what can be logically accounted or what can be proved to have happened, or what one really means at the moment when one speaks. While the Indian conception of *satya* is marked by an inner realization of the wholeness of reality, the Western view of truth is better described in English dictionaries as truthfulness or veracity of individual explicit statement.

In Indian tradition, on the other hand, truth is defined in *Mahābhārata* when it says, '*Satya* is *dharma*, *tapas* (austerity) and *yoga*. *Satya* is eternal *brahma*, *Satya* is also the foremost *yagya*, and everything is established on *Satya*',[14] (). In an illustration of this principle, *Mahābhārata* says that the spirit of *dharma* exists in the *khadga* (sword) also. The *khadga* or sword is a creation of *Brahma* for the purpose of protection and sustenance of the people according the principles of *dharma*. It takes the form of verbal, material, physical or death penalty for those who consciously violate the principles of *dharma* for their own selfish ends.[15]

The concepts of *rta* and *dharma* are of great significance in the ethical and legal tradition of the Vedas. It is the anticipation of the law of karma, one of the distinguishing characteristics of Indian legal thought. It is the law which pervades the whole world, which all gods and men must obey. If there is law in the world, it must work itself out. If by any chance its effects are not revealed here on earth, they must be brought to fruition elsewhere. Where law is recognized, disorder and injustice arc only provisional and partial. The triumph of the wicked is not absolute. The shipwreck of

[14] Mahabharata, V, p.497
[15] ibid. p. 512

the good need not cause despair.[16]

The ideal is envisaged as a fluid ordered universe, or a complex adaptive system, in macrocosmic as well as microcosmic dimensions, in which every element of that giant cosmic order simply does what is most appropriate. In other words, the Vedic conceptualization of order reflects a kind of ecologically sound symbiosis in which every component part plays its proper role. But this is merely the conceptual ideal: real life is a never-ending chain of contradictions, role conflicts, and processes to ascertain specific duties. It can also be viewed as a struggle to find one's path, especially later in the more individualistic contexts of realization-centred beliefs.

More pointedly for a legal analysis, awareness of *ṛta* and *dharma* involved a continuous process of harmonizing individual expectations with concern for the common good, a constant obligation to ascertain the appropriate balance between individual and society, good and bad, right and wrong, the permissible and the prohibited. Vedic law, in other words, is from the start based on a complex and continuous interactive process.[17] Much of this remains invisible and internalized, a truth later brought out forcefully in the dramatic illustrations of the great epics, which can be seen as ancient tools for teaching 'order' in every sense of the word.

Rule of *Dharma*

To the question whether there was a rule of law prevalent in ancient India, evidence for a resoundingly affirmative answer is borne out by the great epic texts. The message of these texts is clear that the King was not above the law. Sovereignty was based on an implied social compact and if the King violated this traditional pact, he forfeited his kingship. It refutes the view that the kings in ancient India were despots who could do as they pleased without any regard for the law or the rights of their subjects. Coming to the historical times of the Mauryan Empire, Kautilya described the duties of a king the *Arthasastra* in the following terms, "In the happiness of his subjects lies the King's happiness; in their welfare his welfare; whatever pleases him he shall not consider as goof, but whatever pleases his people, he shall consider as good."'[18]

One of the most distinguishing aspects as between the concept of the law as defined in the Western jurisprudence and that as defined in *Dharmasastras* is that whereas the imperative command of the king constituted the law according to the former, under the concept of *dharma*, the law was a command even to the king and was superior to the king. This meaning is brought out by the expression 'the law is the king of kings'. The doctrine 'the king can do no wrong' was never accepted in ancient Indian constitutional system. *Tirukkular ,* says that a king is assured of heavenly status if he makes the wrongdoer feel the weight of falling *sengol*, provided the light of justice is hidden in that blow of *sengol.*[19]

[16] Radhakrishnan, p.80
[17] Derrett, 1968, p.2–3
[18] Nazeer, p.7
[19] *Tirukkular*, 57

Another aspect discernible from the definition of 'law' given in the *Brihadarayaka, Upanishad* and accepted in the *Dharmasastras* is that the law and the king derive their strength and vitality from each other. It was impressed that the king remained powerful if he observed the law and the efficacy of the law also depended on the manner in which the king functioned, because it was he who was responsible for its enforcement. There was also a specific provision which made it clear to the king that if he was to be respected by the people, he was bound to act in accordance with the law.

Thus the first and foremost duty of the king as laid down under *dharmasastra* was to rule his kingdom in accordance with the *dharmic* law, so that the law reigned supreme and could control all human actions so as to keep them within the bounds of the law. Though *dharma* was made enforceable by the political sovereign -the king, it was considered and recognised as superior to and binding on the sovereign himself. Thus under Indian ancient constitutional law *(Rajadharma)* kings were given the position of the penultimate authority functioning within the four corners of *Dharma*, the ultimate authority. Rules of *dharma* were not alterable according to the whims and fancies of the king. The exercise of political power in conformity with *"dharma"* was considered most essential. This principle holds good for every system of government and is a guarantee not only against abuse of political power with selfish motives and out of greed but also against arbitrary exercise of political power.

The most rigid enforcement of obligations and duties form, side by side with the most lavish grant of rights and privileges to, both the governor and the governed explain the seeming inconsistency and paradox that characterise the *dharmasastra*, and the great complementarity between the theoretically despotic and the practically democratic features of the political organisation. This is a sound political maxim and is based on the observation of the fact that the peoples' interests and opinions do in most cases differ, and insightful decision making is required at the political. Random scattering of the public opinion requires mediation and guidance from the government.[20]

In deciding upon measures the king should be guided by the truth 'voice of people is voice of god'. Thus though the king is himself a god, the god of the king is the people. The king has been described in *Dharmasastra* as their servant getting remuneration for his work. The peculiar dualism and intergration in the king's position have been very unhesitatingly indicated in the *Sukraniti*. The king is a god no doubt, but *Dharmasastra* do not consider him infallible. The limitations are fully recognised, and moral as well as constitutional restrictions are imposed upon him as upon other men.

The Theory of the Divine Right of Monarchs has therefore to be understood with great modifications and the Western notions of about the infallibility and divinity of Kings and Popes must not be transplanted into the study of Indian Socio-political institutions.[21] The theory that a man may be omniscient is rejected altogether in the

[20] Sarkar, *Sukraniti*, p.51
[21] *Sukraniti*, p.54

Dharmasastra for the very nature of the case goes against the idea. To the argument of physical magnitude, extensity and vastness of political interests is added that of intellectual limitations and incapability of man. Man cannot be omnipresent, he cannot also be omniscient, and therefore he must never be made omnipotent.[22]

The true character of Indian jurisprudence is therefore different from that of the Anglo-American system. The obedience to the *Shruti* and *Smriti* etc., was not due to any political authority of their authors, but the veneration in which they were held by those for whom these writings were intended. These lawgivers showed admirable practical good sense in prescribing rules. While apparently professing to follow the Divine Laws and Commands as found in the Vedas and claiming simply to interpret and explain them to the general public, in reality the *Dharmasastra* so moulded these texts as to bring them in conformity with the general sense of their followers—a fact which secured them a following and obedience which was as universal and strong- as that secured by a political authority.

It has also to be understood well that the area of the jurisdiction of central power in ancient India was limited by the wide autonomy of the local bodies, of village and town governments, and of autonomous, economic, religious and military organizations. Their consent in the rules of dharma, which touched them also, had to be taken into account by any ruler. The idea that the central power was the monistic sovereign did not reflect the reality of social life in India. In the life of the common man, the direct impact of the central power in the country or region was not significant. Society was constituted of many social groups which were voluntary, hereditary, functional and provisional with several groups performing multiple functions. The legitimacy and authority of all these social groups was derived from the same source of *dharma*.

The economic and social support of the central power came from the allegiance and cooperation of these diverse social groups which were fairly autonomous in their day to day functioning. They followed their own *dharma* which was usually in consonance with the *dharmic* law of the land. Thus the central political organisation was not not omnipotent or omnipresent like the fictional sovereign of the legal positivism. It was only one of the many governing social and religious organizations, often the primary, but not one that touched the lives of people deeper than the others. *Dharmic* law was essentially a pluralist law which included and transcended the formal command of the political sovereign.[23]

As a holistic legal system Indian jurisprudence emphasized and intrumentalised the intricate connection between different interlinking elements of the whole experience of human life. Indian law principles were in opposition to the classical positivist theories of law. Indian law concepts thus fall firmly within the theoretical parameters of the sociological school of jurisprudence, which treats legal rules as organically

[22] *Sukraniti*, p.56
[23] Aiyangar, p.179

grown and and socially tested normative orders and therefore does not accept the domination of legal absolutism or positivist.

A deeper analysis of ancient Indian law yields a systemic, multifaceted truth inherent in *dharmic* law, which never developed the aspiration to rule from above in absolutist legal fashion but sought to rule from within the society and individuals. Legal regulation from above, in the absolutist sense, may be apparently prominent, but there are deeper levels of legal regulation which can be ignored only at great cost. *Dharmic* law and its underlying philosophy does not simply accept the simplistic impression that legal rules can solve all problems. In Indian cultural conceptualization, law is eternally and intrinsically connected with other spheres and levels of life.[24]

It was the influence of the Hindu view of life, as given in the *dharmasastra*, that influenced the ruler and the ruled, and promoted their harmonious relations, and facilitated for both the moderation of their actions in accordance with the common ideals of coexistence. The best of all guarantees of good government in the *dharmasastra* was in bringing up the king and his ministers in the same ideals as the common man, and make both realize the supremacy of *dharma* as the both the letter and the spirit of the human law. It is only when human life is seen in the perspective of cosmic coexistence, and how important the self is as part of the cosmic reality and how all existence is interconnected in the common process of creation and transformation, that a proper sense of rules and values can be gained. The function and value of *dharmasastra* is to show the path to this realisation.[25]

Dharmic law is alive and well at several conceptual levels of law, and it enables modern India's creative use of Indian concepts in seeking to construct a justice-focused legal system that does not need the crutches of a foreign legal order, but remains open to modification and reform as and when circumstances suggest it. Thus, to argue that the ancient Indians did not have 'law' would be plain nonsense. If indeed all human societies have law, why should ancient Indian societies be any different? The simple answer is that the ancient Indians conceived of law differently from Western cultures. *Dharmic law*, as is widely acknowledged, represents a culture-specific form of natural law.

Both at the conceptual level and within processes of official law-making and policy formulation, concepts and rules of *dharmic* law retain a powerful voice in how India, in the 21st century, is seeking to achieve social and economic justice for over a billion people. It holds its position as a major legal system of the world, often despised and largely unrecognised, but massively present in the world of the twenty first century. At least a billion people, roughly a seventh of the world citizenry, remain governed by

[24] Menski, p.42
[25] Aiyangar, Aspects, p.180

dharmic law in one form or another. Numerous decisions of the Supreme Court of India and the High Courts and subordinate judiciary bear witness to this social reality.

State law and *dharmic* law are not incompatible, both interact with each other in many ways that we cannot even begin to analyse. Indian traditions are manifestly much more than folkloristic decorations, and *dharmic* law is a demanding multi-disciplinary arena which seems to put researchers off. *Dharmic* law has always been much more than a fossilised book law that could be abolished by the stroke of a pen. It could not simply be reduced to redundancy in the Austinian fashion, that taught Indian leadership to embrace legal positivism as a philosophy and top-down law-making as a magic tool of development. Justice Katju has observed that in ancient and medieval India there was tremendous development not only in the fields of science and philosophy, but also in the field of law. However, he lamented that the advent of British rule denied us the benefits of these developments as the alien rulers made it a policy to demoralise and denigrate us by propagating the idea that Indians were a race with no worthwhile achievement to their credit.[26]

Force of *Dharma*

The foregoing brief discussion will make it clear that the rules contained in the *dharmasutras* and other works on *dharmasastra* relating to *danda* or *sengol* as the force of law had their roots deep down in the most ancient Vedic tradition and that the authors of the dharmasutras were quite justified in looking up to the Vedas as a source of dharma. But the Vedas do not profess to be formal treatises on dharma; they contain only disconnected statements on the various aspects of dharma; we have to turn to the smrtis for a formal and connected treatment of the topics of the dharmasastra. Indian classical texts like the *Manusmriti*, and *Sukraniti*, which are in the category of *Nitisastra, Arthasastra, Dharmasastra*, *Tirukkural*, or *Dharmasutra* deal mainly with the specific topics implied by such Hindu categories as *Dharma* (morals), *Artha* (interests) and *Kama* (desires and passions) as opposed to *Moksa* (salvation).

Dharmasastra texts like *Manusmriti, Yagyavalkayasmriti* and *Sukraniti* reveal keen insight into the principles of strong and good government and political wisdom that find place in Indian texts of the time. These works are based on the principle that the security of the state depends not on the passive virtue of obedience to the laws promulgated by it but on the active cooperation of the people with it in carrying these laws into effect. The structure and functioning of the Indian political system of these times has many points which have anticipated the latest principles of good governance administration and which have yet to be realised by modern States.[27]

In these texts the existence of conflicts, disunions, rivalry and factional spirit is considered to be the greatest of all dangers to social peace and political security. The

[26] Katju, p. 7
[27] Sarkar, Sukraniti, p. 39-40

bond of civil society is torn asunder when the moral system is disrupted. Hence the greatest political offender and the most criminal sinner is he who by his conduct promotes the breach between those who should normally live in amity and peace. The general violence of criminal activity in hindu jurisprudence is seen as the most insidious threat to the order of law.

The main problem with violence is less the injury it causes to some person or group than the threat it poses to the state or other legal authority. *Sukraniti* provides against such offences by the socio-political decree issued by the king. (*Sukraniti,* p. 40). "According to the dictates of *Sukraniti* the execution of bad men is real ahimsa i.e., mercy. One is deserted by good people and acquires sins by always not punishing those ought to be punished, and punishing those who ought not to be, and by being a severe punisher".[28] ().

A state is a state because it can coerce, restrain, compel. Eliminate control or the coercive element from social life, and the state as an entity vanishes. *Danda* is the very essence of statal relations. No *danda,* no state. A sanctionless state is a contradiction in terms. The absence of danda is tanta-mount to *matsya-nyaya* or the state of nature. It is clear also that property and dharma do not exist in that non-state. These entities can have their roots only in the state. The whole theory thus consists of three fundamental rules : no *danda* or *sengol*, no state; no state, no dharma; and no dharma, no individuality and property.[29]

Manusmriti considers *danda* to be a tremendous force for discipline, hard to be controlled by persons with undisciplined minds, it destroys the King who has swerved from duty, along with his relatives. Then it will afflict his fortress and kingdom, the world along with movable and immovable things, as also the sages and the gods inhabiting the heavenly regions. Therefore punishment shall be given appropriately to men who act unlawfully, after having carefully considered the time and place, as also the strength and learning of the accused. When meted out properly after due investigation, punishment makes all people disciplined and happy; but when meted out without due investigation, it destroys all things.[30]

Discipline cannot be justly administered by one whose mind is not disciplined, or who is addicted to sensual objects, or who is demented, or who is avaricious, or whose mind is not disciplined, or who is addicted to sensual objects. Discipline can be administered by one who is pure, who is true to his word, who acts according to the Law, who has good assistants and is wise. The King who metes out punishment in the proper manner prospers in respect of his three aims of virtue, wealth, and pleasure; he who is blinded by affection, unfair, or mean is destroyed by that same punishment. (ibid. p. 292-93). In the same spirit, *Tirukkular* says that if the *sengol* of the king does not rest on justice,

[28] ibid. p. 131
[29] Sarkar, Political Institutions, p. 197
[30] *Manusmriti,* Vol.5, p.289-90

and if he acts without wisdom, he will see his wealth and prestige fade away. [31]().

Having duly ascertained the motive and the time and place, and having taken into consideration the condition of the accused and the nature of the offence, punishment should be given to those deserving punishment. Unjust punishment is destructive of reputation among men and subversive of fame; in the other world also it leads to loss of heaven; he shall therefore avoid it. The king, punishing those who do not deserve to be punished, and not punishing those who deserve to be punished, attains great ill-fame and goes to hell.[32]

In the dharmasastra, punishment emphasizes repentance and reformation over punitiv enforcement. In fact, punishment in the dharmasastra is what makes law effective at all as it contains an understanding of human imperfection and fallibility. Law in its fullest sense can only exist in the world if punishment is there to correct the inevitable misconduct of human beings. Without punsihment, law remains a remote ideal to which no one can aspire. With punishment law becomes the truth that upholds social and individual righteousness. Punishment simultaneously safeguards the overall cohesion of the social system and progressive development of the individual. In *Tirukkural*, the value of the word of the priest, and the value of the honour for men, is considered to rest on the value of the *sengol* held by the king.[33]

The dharmasastra consider *danda* as double edged weapon that works both ways. On the one hand it is a checking of social abuses, a educative and civilizing agent. It is by the administration of effective punishment policy that the State can be saved from a reversion to the law of the jungle and mutual destruction and it is by punishment the people are set on the right path and they become law abiding and prevent themselves from committing aggression against society or indulging in untruths. Punishment is effective moreover in causing the unruly to become civilized and the criminals to give up lawbreaking. It is good also for the rulers and can bring them to see reason if they happen to be accustomed to an insensitive or overbearing behaviour towards the public. Punsihment is the foundation of social life, being the guardian of all virtues and all the methods and means of public policy would be fruitless without a judicious exercise of punishment policy. Its use as a beneficent instrument for public good in social life is therefore unequivocally recommended in all the dharmasastras.[34] ().

At the same time *danda* is also a most effective means of restrain the ruler himself, to the powers that be. The misuse of danda leads to the fall and destruction of the ruler. Manu declares that *danda* would hit the king who deviates from his. It would hit his relatives too together with his territories and possessions. The common good depends therefore on the proper and effective exercise of the *danda*. Manu would not allow any uncultured and ignorant man to be the administrator of *danda*. The greatest amount of wisdom accruing from the help of advisers and others is held to

[31] *Tirukullar*, 57
[32] *Manusmriti*, p. 282
[33] *Tirukkural*, 55
[34] Sarkar, Basic Ideas, p. 513-14

be the essential requisite for the proper use of *dandaniti*. And here is available the practical check on the misconduct of the *danda dhara* in the Indian tradition.[35]

In the double edged weapon of the *danda* we see on the one side interests of the State and on the other individual values of morality, virtue, dharma, etc. In fact, it is to 'educate' man out of the primitive license and beastly freedom that government is instituted. The State is designed to check human vices and restrain them and open out the ways to a fuller and higher life. And all this is possible only because of *danda*. The conception of this eternal connection of individual and society is one of the greatest contributions of the political philosophy of the India to human thought. This concept changes the focus from what law checks to what law enables. It suggests that every judicial system must be based on morals and ethical elements which can be comprehended in popular and religious terms.

In accordance with the principle of *danda*, the state is conceived as an educational institution. It is an institution in and through which men's weaknesses are purged, and it thereby becomes an effective means to the general elevation of mankind. The dharmasastra therefore consider the state to be an institution " necessary " to the human race if man is not to suffer in the condition of matsya-nyaya under the law of animals. Man, if he is to be man, cannot do without political organization. He must have a state and must submit to sanction, enforcement and punishment — in a word, to *danda*.[36]

In recent years social scientists have proposed a link between social cohesion, religion, and punishment. Even in the smallest-scale societies, social scientists have argued, participation in religious and cultural rituals strengthens group solidarity and improves social harmony. Recently, researchers have begun to put these cultural speculations to the test through both systematic field studies and laboratory experiments. Laboratory studies, for example, have shown that synchronous movements, like dancing or marching, foster greater solidarity and more cooperation. Consistent with the multilevel account above, both cultural and historical studies reveal how social cohesion has driven the diffusion of effective rituals and devotions. This suggests that deep in our evolutionary history, social cohesion was favoring social norms and rituals that increased solidarity.[37]

While group-bonding rituals initially evolved to make face-to-face communities cooperative and cohesive, gradually these ritual transformed for the scaling up of cooperation to larger imagined communities in which thousands of individuals interact, exchange, and cooperate. To facilitate this degree of scaling up, researchers have argued, cultural evolution, by anchoring on human species' innate capacities to entertain the existence of supernatural agents, led to the emergence of increasingly powerful and morally concerned deities (or supernatural forces) who monitor and

[35] ibid.
[36] Sarkar, Political Institutions, p.203
[37] Henrich, p.230

punish non-cohesive or antisocial activities, such as murder, theft, or adultery.[38]

Over time, faith and beliefs about these supernatural forces evolved further to increase their effectiveness: Gods expanded their range of moral concerns (e.g., openness toward strangers), ability to monitor norm violators (e.g., mind-reading abilities, omniscience), and power to punish (e.g., controlling the afterlife). Here, consistent with models of social norms based on punishment, gods were turned into super punishers who could impose penalties in this life and the next.[39]

A key psychological test of this hypothesis is whether people who believe in more powerful, moralizing gods are indeed more inclined to cooperate with others. Researchers have shown that individuals from diverse cultures and traditions who report stronger beliefs in more powerful moralizing gods are more fair-minded in experiments with anonymous persons and more supportive of public goods. To examine whether supernatural agents can indeed cause people to behave more cooperatively, many studies have shown that when imbued with thoughts of god and specifically thoughts of supernatural punishment, believers become more fair-minded, cooperative, and honest with strangers. Together with historical and cross-cultural data supporting the claim that gods became increasingly morally concerned, powerful, and punishing over historical time, the psychological evidence suggests that certain religions may have evolved culturally in ways that have altered people's psychology and thereby permitted the cohesiveness of societies.[40]

Conclusion

The doctrine of *dharma* in its entirety imparts to *danda* the character of an instrument for the cohesion of society and advancement of culture. *Dharma* elevates man out of superficial sensory perceptions by instituting legislation, adjudication, and the enforcement of duties. The functions of hindu law are in keeping with the ideas involved in the doctrine of *dharma*. Hindu law as a pedagogic or purgatorial or moral-training institution is not merely an ownership-securing agency, but a dharma-promoting community. And herein, the Indian knowledge tradition provides the justification for considering the concept of *danda* and *sengol* as a symbol of devotion to the cause of furtherance of the 'highest good' of man in a cohesive society.

[38] Norenzayan et al. p.2
[39] Purzycki, p.1
[40] Henrich, ibid.).

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The Dharmasastra and Modern Law

Letter and Spirit of Law in Indian Tradition

Sunil Sondhi

Abstract

This article on the dharmasastra and modern law uses the concept of legal pluralism that has an important place in recent debates about the nature and aims of law. The concept of legal pluralism means that law should be treated as embedded in the broader culture and tradition of society. In a sense, law is culture. Concept of legal pluralism emphasizes diversity in the professional juristic realm in different countries and societies. It refers to a general consciousness or experience of law that is widely shared by those who constitute a nation. Culture is fundamental — a kind of lens through which all aspects of law is perceived, or a gateway of understanding through which we must pass so as to have any genuine access to the meaning of law in society.[1]

In India, the social and cultural concepts of law that emerge out of the several frames of reference in the Veda, Dharmasastra, the constituent assembly debates and the judicial decisions, enable us to view the law in an integrative perspective that is closer to Indian cultural tradition. The value of such historical and sociological approach lies in its unifying vision of the social, cultural and positivist aspects of the concepts of law in Indian tradition.

A juridical system that does not correspond to the social and cultural sensitivities of a society can not be owned by the people as their system but will be seen as something foreign and imposed. Without a conducive social and cultural conceptualization mere formal law cannot create willing legal and moral obligation. A holistic concept of law including both ethical and legal perspectives seems to provide a more realistic picture of Indian legal tradition.

Introduction

In the context of Indian knowledge tradition in general and *dharmasastra* in

[1] Capra, 2015; Glen, 2010; Sarat, 1993.

particular, there has been no misunderstanding more serious in nature than the supposition that Indian culture and tradition is fundamentally 'religious', in the sense in which the words 'religion' and 'religious' have been used in the West for centuries. These imply a belief in one exclusive God or messenger as the creator or visionary of the universe, an exclusive book containing the life and the sayings of that messenger of God, a separate code of commandments, a conclusive corpus of ecclesiastical laws to regulate thought and behaviour in the light of these, and a hierarchy of priesthood to supervise that regulation and control and promote proselytization.

The Indian concepts of *dharma* and *dharmasastra* mean none of these. It is to this confusion that we can trace most of the Western misconceptions of Indian society, culture and law. Understanding of many of Indian social and legal institutions continues to be founded upon such misconceptions which are often the source of the social and political problems that the people of India face today. The assumptions underlying Western law and jurisprudence at different stages of its development were radically different from the assumptions of traditional Indian law and jurisprudence. It was the Western political and legal philosophy narrowly and rigidly based on the rights of the individual that dominated the constitution-making in India.

Many Western scholars and their Indian followers with their apemanship and parrotry, vigorously refuse to accept the indigenous identity of law in India, primarily because their assumptions about 'law' differ from the internal categories of indigenous law. The main problem that arises in connection with understanding indigenous law, has been the regular attempt – by insiders as well as outsiders - to deny that this important legal system actually has its own capacity for internal modernisation. India's indigenous law is much more than state law and thus it explicitly rejects the usefulness of legal positivism as an analytical tool for understanding the actual complexity of law. The projected decline and virtual abolition of indigenous law is nothing but a constructed myth that has served certain purposes and modernist agenda – and continues to do so with much persuasion - but it cannot deny the social, cultural and legal realities of Indian culture and tradition.[2]

Modern Law

Contemporary Western jurisprudence is a product of long Western history and is coloured by a Western culture based on the Hellenistic and Christian view of man and society. The universalistic achievements of Western jurisprudence disguise its cultural specificity. That specificity may have been in some cases diffused by or assimilated into different specificities of different cultures, but in other cases it has conflicted with or been rejected by them. In all cases, Western jurisprudence, convinced of its illusion of universality, does not pay due attention to the cultural problems which accompany

[2] Altekar, 1952; Apte, 1954; Jois, 2022; Lingat, 1973.

such diffusion or conflict between Western specificity and non-Western specificities.[3]

The first attempt to create a modern scientific theory in jurisprudence was the positivist theory of the English Jurists Bentham and Austin. Bentham and Austin utilized the positivist approach of Auguste Comte to the explore subject of jurisprudence. They insisted that one should study the law, including the legal structure, the legal concepts etc. as it is, and not how we would like it to be. This was the scientific approach at that time because in science also we study objective phenomena as it is and not how we like it to be. For instance, when we study the atoms in physics we study the nucleus, the electrons orbiting around it, etc. We do not speculate how the atom should behave according to our own wishes, but we study it as it is. The same approach was adopted by Austin and Bentham in jurisprudence.[4]

Positivist jurisprudence regards law as a set of rules (or norms) enforced by the State. As long as the law is made by the competent authority after following the prescribed procedure it will be regarded as law, and we are not concerned with its goodness or badness. We may contrast this with the natural law theory which says that a bad law is not a law at all. "The science of jurisprudence is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness". Thus, positivism seeks to exclude value consideration from jurisprudence, and confines the task of the latter to analysis and systematization of the existing laws. The separation of law from ethics and religion was a great advance in Europe from the feudal era.[5]

It has been a general belief among both scholars and laymen that law is a special mechanism for establishing social order isolated from other social mechanisms and, for this reason, that the scientific study of law should be confined to the special capacity of positive legal jurisprudence. While positivism was a great advance over natural law and was suited to modern industrial society, it had a great defect that it only studied the form, structure, concepts etc. in a legal system. It was of the view that study of the social and economic conditions and the historical background which gave rise to the law was outside the scope of law and jurisprudence and belonged to the field of sociology.[6]

However, unless we see the historical background and social and cultural circumstances which give rise to a law it is not possible to correctly understand it. Every law has a historical background and it is heavily conditioned by the social and cultural system prevailing in the country. The flaw in positivism therefore was that it reduced jurisprudence to a merely descriptive science of a low theoretical order.

[3] Chiba, p.2.
[4] Katju, p. 17.
[5] Menski, p.6.
[6] Chiba, 2009, p.1

There was no attempt by the positivist jurists, like in sociological jurisprudence, to study the historical and socio-cultural factors which gave rise to the law. Positivism reduced the jurisprudence to a very narrow and dry subject which was cut-off from the historical and social realities. It deprived the individual and the society of jurisprudence of flesh and blood.[7]

Legal Pluralism

The cultural relativism approach that emerged in social sciences in the twentieth century in the wake of Einstein's theory of relativity, and the uncertainty principle of Werner Heisenberg, argued that a society's institutions and practices should be understood based on that society's own culture. Edward Sapir and Benjamin Whorf, major proponents of cultural relativism, argue that the norms and values of one culture should not be evaluated using the norms and values of the other. Another way of saying this is that many features of human experience are entrenched or embedded in social and cultural conceptualizations. Cultural relativism offers both a theoretical and an analytical framework for investigating cultural conceptualizations that underlie the social and cultural practices and institutions. At the heart of the theoretical framework of cultural relativism is the notion of cultural cognition, which affords an integrated understanding of the notions of "knowledge" and "culture" as they relate to social practices.[8]

Viewed in this context, the letter and spirit of law in India is not limited to the monistic system of state law as maintained by Western jurisprudence in accordance with methodological postulates of legal positivism. The whole structure of law as an aspect of Indian culture includes all regulations, however apparently different from state law, which the people concerned observe as law in their cultural tradition, including value systems. The very cultural identity India demands that we include all of them in a whole structure and functioning of law in the country. Thus, the nature of law in India is plural, consisting of different systems of law interacting with one another harmoniously or conflictingly.[9]

At the same time it is true that the people and scholars of India who have cherished their own jurisprudence with specificities quite different from the Western, have not succeeded nor even attempted to present the achievements of their jurisprudence before the world circle of legal science forcibly enough to cause the proponents of Western jurisprudence to doubt their conviction of universality of Western jurisprudence. Without presenting the achievements of their own jurisprudence before world bodies specifically aimed at self-reflection of model jurisprudence, Indian scholars remain unqualified to criticize the ethnocentricity of the latter, as recently

[7] Cardozo, 2020, 2021; Schauer, 2022.
[8] Einstein, 1982; Heisenberg, 1989; Carrel, 2019, Chiba p.4.
[9] Chiba, p.4.

pointed out by some Western scholars.[10]

Such a negative or passive attitude may be another reason why Western jurisprudence has in general disregarded the jurisprudence of different cultures - jurisprudence with due respect to indigenous legal cultures in non-Western countries. Vital to the proper understanding of law in Indian culture is, firstly, for Indian scholars to present their own data and views positively in order not to negate the significance of western jurisprudence, but to maintain a sound understanding of its nature when utilized in different cultures.[11]

The assertion that law is simply the law of the sovereign State misses the point that the law gets its meaning from the intersection of legal and various other social systems of meaning. Law like any other institution of society is interconnected with other institutions. The task of legal scholars therefore, is to recognise the connections between the law and social, political and cultural systems. The interdisciplinary study of law must mean that it brings the knowledge of the legal doctrine and analyzes it in the context of the knowledge of other disciplines. In doing so it carries the responsibility to try and achieve social justice for all. Despite the never-ending debates about modernisation and secularism in India, *dharmic* law, governing the social majorities of India's population, has continued to play a key role in the development of the state legal apparatus and will continue to do so. It does not matter whether scholars like this or not.[12]

Dharma, the foundation upon which all life is based in India, is immeasurably more than 'religion'; mistakenly one has been taken to be the other. The Indian mind did not think in terms of contesting polarities of the *either/or* kind. It would be yet another misunderstanding if the statement that *dharma is* profoundly secular is taken to mean that it is for that reason anti-religion, or that it has concern with other human beings in the form of legal accountability alone. The secular nature of *dharma* lies in the fact that all Indian explanations of man are evidently located in man himself, in the very structure of his being. It is that which binds one human being with another. The ethical foundations, and the limits of one human being's conduct towards another, are already inherent in man's being, in the force of *dharma*.

In modern times, when secularism is upheld as an ideal and religion has been separated from politics such a linkage may appear far-fetched. The Indian view is different. Morality, to have effective force in practice must be based on rules of cosmic order. The unruly conditions of the modern world could have been avoided if *dharmic* values had been upheld, and personal, social and national behavior had been harmonized with the complex adaptive system running through the history of cosmic

[10] ibid. p.2
[11] ibid.
[12] Jois, 1993; Jois, 2000; Kane, 1962-75, Moghe, 2003.

creation. *Dharma* can be comprehended by its application in daily life, by the consideration of the diverse form it takes, by its effects both visible and invisible, the empirical evidence behind it, and and the occasion for its use and or application. *Dharma* stands for natural law, civil and moral law, justice, virtue, merit, duty, morality and quality.[13]

The study of *dharmic* law has been neglected in the decades since independence due to a combination of declining knowledge of its classical foundations and the pressures of modern political correctness, to the effect that studying *dharmic* law is often seen as a regressive activity. Anything 'Indian' is therefore quickly dismissed in many ways, by those who imagine and assert that a modern world, by which is often meant a Western-inspired world, can do without so-called primitive religious and cultural traditions. They have conveniently forgotten that the so-called modern western traditions have their own roots in Western cultural and religious traditions. So how can India be called upon to 'modernise', if that means giving up the social and cultural concepts that make up the fabric of the Indian identity?[14]

Since *dharmic* law has always been a reflection of the way of life of millions of very diverse people, what was abolished by the formal law was manifestly only a fragment of the entire field and of the social reality of *dharmic* law. The conceptual framework and the entire customary social structure of Indian culture, remained largely immune to the powerful wonder-drug of legal modernisation which had been administered in measured doses since well before 1947 and was again used during the 1950s and decades thereafter. Something as complex as Hindu personal law could not be reformed away and ultimately abolished by statute, nor could its influence as a legal normative order that permeates the entire socio-legal Indian field simply be legislated away. India's indigenous law has always been a people's law, whether or not the state wished to see it that way. Despite enormous internal changes, *dharmic* law as a conceptual entity has remained an integral part of the living and lived experience of all Indians.

Vedic Vision

The Vedas give us a hierarchy of different levels of reality down from the all- embracing absolute, which is the primary source as well as the final consummation of the world process. The different kinds of being are the higher and lower manifestations of the one absolute spirit. There is correspondence or underlying unity between the absolute and the relative, the unmanifest cosmic reality is not separate or isolated from the objective reality. Whatever is in the cosmos and beyond is essentially true in the individual also. Whatever is stated of the cosmic reality is applicable to the human

[13] Aiyangar, 2018, p.62.
[14] Aiyangar, 2018, p.62.

body, and each individual is spoken of as a descendant of the cosmos.[15]

The universal is collective. The collective is of no importance without the particular and the latter cannot exist without the former. If the collective is not manifested in creative individuality, and it remains enclosed within its rigid unity, it would neither be the universal nor the highest power. The collective and the individual are not exclusive. One cannot exist without the other; individuality is the fulfillment of the collective; the collective is the underlying foundation and the individual human being is its highest manifestation. The collective is ever seeking its consummation in the individual. As Tagore summed it up "You without me, I without you are nothing".[16]

There are two kinds of knowledge to be acquired, namely, *apara* and *para*-lower and higher. The lower knowledge is constituted of the Vedic texts themselves, the higher knowledge is that which goes beyond the texts of the Veda. Realising the higher truth or knowing the absolute reality is more important than merely being satisfied with words of Veda or outer shell of their meaning. The person who knows the Veda but does not know their meaning is only carrying a load. Before the knowledge of absolute, mere perception can be misleading. When our understanding is enlightened with higher knowledge we can understand the relative in a more complete sense.[17]

In keeping with this Vedic vision of reality and knowledge, Panini developed his theory of grammar in which the structure of language is seen as an ascending order of relations between words and concepts from the perceptible level of manifest reality to the highest level of abstraction which is farthest from objective perception. The intermediate levels of increasing abstraction eventually merge in the Sabda Brahman where linguistic reality loses its autonomy and merges in the absolute reality.[18] In the *Natyasastra*, Bharatmuni set out to use the very language and vovacbulary of name and form to evoke that which is beyond form or without form, and all this through the vehicle of verbal and non-verbal expression of feeling.[19]

Vedic sages realized the overarching presence of *rta*, an invisible cosmic law that held together in order a complex and adaptive system at different levels, forms, and phases of all the objects and processes that comprised the cosmos. All the forms of being existing and developing in harmony within an interconnected web of relationships were seen as organized in a system which integrated all the parts into an undivided whole in flowing movement. The cosmic order which extended to all levels of existence from the infinite to the infinitesimal was seen as inviolable, never to be broken, even by the Vedic divinities who were in fact considered as the guardians of *ṛta*.[20]

[15] RV, 1.164.4-5.
[16] Tagore, 113.
[17] RV, 1.164.39.
[18] Kapoor, p. 86.
[19] Vatsyayan, p.57
[20] Khanna, 2004; Menski, p.90.

Īśa Upaniṣad brings out the systemic aspect of cosmic order most succinctly and clearly. It says that the Absolute Reality is both universal and particular. The creation of the particular from the universal does not affect the integrity of the universal. The principle or quality of wholeness and integration is prior to the principle of particular and diversity. Oneness becomes many in the image of the oneness. That is whole, this is whole, taking out a particular whole from the absolute whole leaves the absolute whole integrated and creative as before. Every particular entity has to be an integrated whole to maintain its identity amongst an integrated system of infinite entities. The wholeness or integrity of each part is the bedrock of the wholeness of the universe and the order of the cosmos, and the order of the cosmos is the bedrock of the wholeness of the particular.[21]

The Vedic texts give a reasonably clear picture of the world views of the Vedic sages, of their ideas about man's place in the world, in particular of the Vedic conceptualization of *ṛta* as macrocosmic order. Herein lies the importance of the Vedas as a source of *dharma*. They elucidate the early conceptual underpinnings of Vedic law which are absolutely central for understanding the emerging legal system as a whole. The central point appears to be that 'law' is an entity beyond direct human control. It exists, and yet does not claim institutional loyalty, as a state legal system would do.[22]

Ṛta is the principle whereby the Absolute Reality becomes manifest and perceptible to human senses. In *Ṛg Veda* it is said that, 'heaven and earth exist in close unison in the womb of *ṛta*'. *Ṛta*, thus, is the one single system that embraces the cosmic order. The concept of *ṛta* explains the course of the evolution and sustenance of the natural and human world in terms of rhythm, time cycle, seasons, and biological growth. It refers to three basic elements of birth, growth, and transformation as the components of the complex cosmic system which functions according to its own self- organizing principles and law. Scholars, scientists, and poets in all ages have always found it amazing that the Absolute Reality is so well- ordered. In a landmark Supreme Court judgement, Chief Justice P. B. Gajendragadkar called this 'great world rhythm' one of the basic concepts of Hindu philosophy.[23]

The early key concept of *ṛta* metamorphosed gradually into *dharma* which may be understood as microcosmic order or duty, the central *dharmic* legal term, which in one form or another underlies and suffuses all the later texts. *Dharma* became clearly the core concept of Vedic tradition, and thus of Vedic law. Its relevance in legal terms can be explained quite simply in that life is seen as a complex experiential reality, in which everybody and everything has a role to play and is visibly and invisibly interconnected in a giant systemic network of cosmic dimensions, a kind of universal spider's web.

[21] Isavasaya, p.64-67.
[22] Tripathi, 2022; Narang, 1988
[23] 1966 SCR (3) 242.

Individual roles and obligations are, of necessity, quite disparate for different people; they depend on contextual factors like gender, age, or place in society. *Dharma* as a central legal concept thus suggests unlimited plurality at the level of social reality within a *dharmic* systems theory that defies rational deconstruction.

Ṛta is a multidimensional concept which is connected to other fundamental concepts like *brahma, atma, dharma, and satya,* in the *Veda,* Epics*, Upaniṣads* and the *Dharmaśāstra*. In its most fundamental sense*, ṛta* is the law, order, system, harmony underlying all natural phenomena. *Ṛta* is the all-pervasive universal order that is same at all levels of existence, and the objective world is the expression of that order. The field of *ṛta* is physical, mental, spiritual, and ethical. Nature as it is known to us is not seen as a chaotic occurrence of events and objects. While it may appear as random and disorganized, the fundamental processes of nature that underlie all objective, and subjective realms too, function as a complex system in which all parts are coordinated and integrated into a larger whole.

Indian conceptualizations of *ṛta, dharma, and satya* are not comparable with Western principles in the sense that they provide specific ethical permissions or prohibitions. Truth in the Western sense is the sum of what can be isolated and counted, it is what can be logically accounted or what can be proved to have happened, or what one really means at the moment when one speaks. While the Indian conception of *satya* is marked by an inner realization of the wholeness of reality, the Western view of truth is better described in English dictionaries as truthfulness or veracity of individual explicit statement.

In Indian tradition, on the other hand, truth is defined in *Mahābhārata* when it says, '*Satya* is *dharma*, *tapas* (austerity) and *yoga*. *Satya* is eternal *brahma*, *Satya* is also the foremost *yagya*, and everything is established on *Satya*'. In an illustration of this principle, *Mahābhārata* says that the spirit of *dharma* exists in the *khadga* (sword) also. The *khadga* or sword is a creation of *Brahma* for the purpose of protection and sustenance of the people according the principles of *dharma*. It takes the form of verbal, material, physical or death penalty for those who consciously violate the principles of *dharma* for their own selfish ends.[24]

The concepts of *rta* and *dharma* are of great significance in the ethical and legal tradition of the Vedas. It is the anticipation of the law of karma, one of the distinguishing characteristics of Indian legal thought. It is the law which pervades the whole world, which all gods and men must obey. If there is law in the world, it must work itself out. If by any chance its effects are not revealed here on earth, they must be brought to fruition elsewhere. Where law is recognized, disorder and injustice arc only provisional and partial. The triumph of the wicked is not absolute. The shipwreck of

[24] Mahabharata, p. 512.

the good need not cause despair.[25]

The ideal is envisaged as a fluid ordered universe, or a complex adaptive system, in macrocosmic as well as microcosmic dimensions, in which every element of that giant cosmic order simply does what is most appropriate. In other words, the Vedic conceptualization of order reflects a kind of ecologically sound symbiosis in which every component part plays its proper role. But this is merely the conceptual ideal: real life is a never-ending chain of contradictions, role conflicts, and processes to ascertain specific duties. It can also be viewed as a struggle to find one's path, especially later in the more individualistic contexts of realization-centred beliefs.

More pointedly for a legal analysis, awareness of *ṛta* and *dharma* involved a continuous process of harmonizing individual expectations with concern for the common good, a constant obligation to ascertain the appropriate balance between individual and society, good and bad, right and wrong, the permissible and the prohibited. Vedic law, in other words, is from the start based on a complex and continuous interactive process.[26] Much of this remains invisible and internalized, a truth later brought out forcefully in the dramatic illustrations of the great epics, which can be seen as ancient tools for teaching 'order' in every sense of the word.

The divinely inspired Vedas, the *dharmasastra* reflecting the Vedic ideals, virtuous conduct of the learned and finally, one's own conscience formed the four-fold bases of *dharma*. The common conscience of the community, emerging in the form of immensely diverse customary practices of different communities and villages formed dynamic source of law. While customs were elevated to the status of law, they too had to be sanctified by good conscience. Thus, in the Vedic tradition we find indigenous versions of many of the principles that constitute the foundations of our legal system even today: impartial rules of procedure, principles of equity and even the subjection of the sovereign to over-arching ideas of justice.[27]

Dharmasastra

Dharma means much more than what is commonly understood by religion, and the *dharmasastra* means much more than religious texts. While there is something in the very nature of semitic religion which is divisive, conclusive and exclusive, *dharma* is inclusive, open and it unites. Religion excludes all that it is not in a particular religion, *dharma* includes every form and view of life. Religion often makes claims that are not based on experience, the claims of *dharma* are the claims of life and science. While religion and politics must necessarily be separated for a safe and sane world, legal and political thought and practice must necessarily have its basis in *dharma*.

[25] Radhakrishnan, 2019, p.80.
[26] Derrett, 1968, p.2–3.
[27] GOI, p.13.

As far as basic aspects of Dharma are concerned, they were clearly set out in Manu Smriti and Yajnavalkya Smriti as follows:- Veda is the first source of Dharma. Smriti texts, the virtuous conduct of those who are well versed in the Vedas, and lastly, what is agreeable to the good conscience, are the other sources.[28] The Vedas, the Smritis, good conduct or approved usage, what is agreeable to conscience proceeding from good intention, are the sources of law.[29]

The common conscience of the community, emerging in the form of immensely diverse customary practices of different communities and villages formed dynamic source of law. While customs were elevated to the status of law, they too had to be sanctified by good conscience. Being essentially a scheme of just social order, dharma was the goal set for king and the subjects. It was declared to be the king of kings by means of which the weak could prevail over the strong. Thus, their structure of law had dharma as its axis. In identifying appropriateness of action, multiplicity of views expressed in different *dharmashastras* prevailed, thus allowing plurality-conscious universalistic principles.[30]

Dharmasastra provide comprehensive guidance to regulate human conduct in accordance with the given system of cosmic creation and fulfill the purpose of one's life. The whole life of a person considered both as a an individual and as a member of social groups, as well as a person's relationship with fellow individuals, to the other living beings, to cosmic reality generally and to one's conceptions of God come within the purview of the concept of *dharma*. Among the duties that were laid down are both self-regarding and other-regarding, those to the living, those yet to be born and those no longer alive.[31]

The *dharmasastra* were an attempt to explain facts of moral life within the terms of a cosmological order. The structure of *dharmasastra* law had *dharma* as its axis. In identifying appropriateness of action, multiplicity of views expressed in different *dharmashastra* prevailed, thus allowing plurality-conscious universalistic principles. The office of king was regarded as an institution necessary for the maintainance of the order established by the creator for the good of creatures.[32]

The king had the duty to establish what may have been practised by the virtuous and learned Brahmins, unless it was opposed to the customs of the region, clan or caste. The king's duty to act with a sense of proportion in the matter of imposition of punishments demonstrates the link between equality and justice and equity as the corrective and supporting principle. Quantification of punishment in proportion to the

[28] Manu Smriti, II-6.
[29] Yagyavalkya Smriti, V 1-7.
[30] GOI, p.33.
[31] Banerjee, 1998; Baxi, 1986.
[32] Lingat, p. 207.

evil was a sign of a mature legal system. Similarly, by affirming strongly that in case of doubt punishment will not be imposed, the legal system exhibited great wisdom.[33]

Brihaspatismriti categorically rules: No sentence should be passed merely according to the letter of the law. If a decision is arrived at without reasoning and considering the circumstances of the case, there is violation of dharma. This approach of transcending the letter of the law in the light of the spirit of justice reflects the functional character of the legal system aiming at a benevolent result. The idea that justice will prevail over law reflects the acceptance of the limitation of man-made law and a notion of higher moral law as the superior principle. The larger discretion in the interests of justice gave scope for application of equity and good conscience.[34]

This view of law is not confined to India alone; it is characteristic also of the Indianized states of Southeast Asia. In Cambodia, the Hindu doctrines of law were followed in their original form-although, as the epigraphy shows, some modifications were made. In Burma, the *dhammasattha* was an attempt to use the Hindu system as a model in an environment entirely given over to the Buddhist faith. For example, the Code of Wagaru retains the sastric classification of contentious matters into eighteen types; but the content of the texts is very much a matter of local Burmese rules. The Hindu system was not introduced as such; rather, it was used as a guide to form.[35]

Although the Buddhist religion did not contain any revelation on the social order, the *dhammasatthas* were held to have originated on the cakkava-la (the wall that surrounds the universe) and to have been given to man by the hermit Manu. This personage has nothing in common with the Manu of the smrti except his name, but the choice of his name does emphasize the separation of the texts from the world of Buddha. The laws of Buddha reveal the conditions of salvation; those of Manu, the bringer of the law from the walls of the world, determine the conditions of social life.

However, the law of the *dhammasatthas*, like the sastras, transcends the world it rules. It is bound to the cosmic order and is free from the will of men. It was a universal law in the Hinayana Buddhist world.[36]

In pre-twentieth-century Thailand, we also have a *dhammasattha* dating from the fourteenth century. According to this text the law laid down had authority only when it conformed to *dhammasattha* precepts, only when it expressed the royal will in accordance with the view of nature expressed in the texts of the law. But it did have the effect of putting the king in the center of the legal world, and the texts became a more immediate foundation for the justification of kingly power than was the case in India.

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[33] GOI pp.39-43.
[34] ibid. p. 34.
[35] Hooker, p.217.
[36] ibid.

This is characteristic also of the Javanese and Malay texts; indeed, the over-whelming impression one gets from such texts is that, although they do contain rules for the distribution of obligation, their main characteristic is concern with the nature of royal power, its acquisition and its use according to the precepts of the received texts.[37]

Power in Javanese thought is both concrete and constant in quantity. It follows, then, that later generations may acquire and utilize the power of long-dead heroes and gods. It means also that power is concentrated at the center, in the ruler, so that

central government is essentially an extension of the ruler's personal household. The ideal form of temporal power is a world-empire into which all entities are combined in a coherent unity. The existence of this unity is itself defined in the proper use of power and through the proper conduct of individuals, which must be in accord with *dharma*.[38]

Dharmarajya

To the question whether there was a rule of law prevalent in ancient India, evidence for a resoundingly affirmative answer is borne out by the great epic texts. The message of these texts is clear that the King was not above the law. Sovereignty was based on an implied social compact and if the King violated this traditional pact, he forfeited his kingship. It refutes the view that the kings in ancient India were despots who could do as they pleased without any regard for the law or the rights of their subjects. Coming to the historical times of the Mauryan Empire, Kautilya described the duties of a king the *Arthasastra* in the following terms, “In the happiness of his subjects lies the King’s happiness; in their welfare his welfare; whatever pleases him he shall not consider as goof, but whatever pleases his people, he shall consider as good.”[39]

One of the most distinguishing aspects as between the concept of the law as defined in the Western jurisprudence and that as defined in *Dharmasastras* is that whereas the imperative command of the king constituted the law according to the former, under the concept of *dharma*, the law was a command even to the king and was superior to the king. This meaning is brought out by the expression 'the law is the king of kings'. The doctrine 'the king can do no wrong' was never accepted in ancient Indian constitutional system. *Tirukkural,* says that a king is assured of heavenly status if he makes the wrongdoer feel the weight of falling *sengol*, provided the light of justice is hidden in that blow of *sengol.*[40]

Another aspect discernible from the definition of 'law' given in the *Brihadarayaka, Upanishad* and accepted in the *Dharmasastras* is that the law and the king derive

[37] Ibid., p.216
[38] Ibid.
[39] Nazeer, p.7.
[40] *Tirukkural*, 61.

their strength and vitality from each other. It was impressed that the king remained powerful if he observed the law and the efficacy of the law also depended on the manner in which the king functioned, because it was he who was responsible for its enforcement. There was also a specific provision which made it clear to the king that if he was to be respected by the people, he was bound to act in accordance with the law.

Thus the first and foremost duty of the king as laid down under *dharmasastra* was to rule his kingdom in accordance with the *dharmic* law, so that the law reigned supreme and could control all human actions so as to keep them within the bounds of the law. Though *dharma* was made enforceable by the political sovereign -the king, it was considered and recognised as superior to and binding on the sovereign himself. Thus under Indian ancient constitutional law *(Rajadharma)* kings were given the position of the penultimate authority functioning within the four corners of *Dharma*, the ultimate authority. Rules of *dharma* were not alterable according to the whims and fancies of the king. The exercise of political power in conformity with *"dharma"* was considered most essential. This principle holds good for every system of government and is a guarantee not only against abuse of political power with selfish motives and out of greed but also against arbitrary exercise of political power.

The most rigid enforcement of obligations and duties form, side by side with the most lavish grant of rights and privileges to, both the governor and the governed explain the seeming inconsistency and paradox that characterise the *dharmasastra*, and the great complementarity between the theoretically despotic and the practically democratic features of the political organisation. This is a sound political maxim and is based on the observation of the fact that the peoples' interests and opinions do in most cases differ, and insightful decision making is required at the political. Random scattering of the public opinion requires mediation and guidance from the government.[41]

In deciding upon measures the king should be guided by the truth 'voice of people is voice of god'. Thus though the king is himself a god, the god of the king is the people. The king has been described in *dharmasastra* as their servant getting remuneration for his work. The peculiar dualism and integration in the king's position have been very unhesitatingly indicated in the *Sukraniti*.[42] The king is a god no doubt, but *Dharmasastra* do not consider him infallible. The limitations are fully recognised, and moral as well as constitutional restrictions are imposed upon him as upon other men.

The theory of the divine right of monarchs has therefore to be understood with great modifications and the Western notions of about the infallibility and divinity of Kings and Popes must not be transplanted into the study of Indian Socio-political institutions.[43] The theory that a man may be omniscient is rejected altogether in the

[41] *Sukraniti*, p.51.
[42] ibid.
[43] ibid., p.54

Dharmasastra for the very nature of the case goes against the idea. To the argument of physical magnitude, extensity and vastness of political interests is added that of intellectual limitations and incapability of man. Man cannot be omnipresent, he cannot also be omniscient, and therefore he must never be made omnipotent.[44]

The true character of Indian jurisprudence is therefore different from that of the Anglo-American system. The obedience to the *Shruti* and *Smriti* etc., was not due to any political authority of their authors, but the veneration in which they were held by those for whom these writings were intended. These lawgivers showed admirable practical good sense in prescribing rules. While apparently professing to follow the Divine Laws and Commands as found in the Vedas and claiming simply to interpret and explain them to the general public, in reality the *Dharmasastra* so moulded these texts as to bring them in conformity with the general sense of their followers—a fact which secured them a following and obedience which was as universal and strong as that secured by a political authority.

It has also to be understood well that the area of the jurisdiction of central power in ancient India was limited by the wide autonomy of the local bodies, of village and town governments, and of autonomous, economic, religious and military organizations. Their consent in the rules of dharma, which touched them also, had to be taken into account by any ruler. The idea that the central power was the monistic sovereign did not reflect the reality of social life in India. In the life of the common man, the direct impact of the central power in the country or region was not significant. Society was constituted of many social groups which were voluntary, hereditary, functional and provisional with several groups performing multiple functions. The legitimacy and authority of all these social groups was derived from the same source of *dharma*.

The economic and social support of the central power came from the allegiance and cooperation of these diverse social groups which were fairly autonomous in their day to day functioning. They followed their own *dharma* which was usually in consonance with the *dharmic* law or legal culture of the land. Thus the central political organisation was not omnipotent or omnipresent like the fictional sovereign of the legal positivism. It was only one of the many governing social and religious organizations, often the primary, but not one that touched the lives of people deeper than the others. *Dharmic* law was essentially a pluralist legal culture which included and transcended the formal command of the political sovereign.[45]

As a holistic legal system Indian jurisprudence emphasized and instrumentalised the intricate connection between different interlinking elements of the whole experience of human life. Indian law principles were in opposition to the classical positivist

[44] ibid., p.56
[45] Aiyangar, 2018, p.179.

theories of law. Indian law concepts thus fall firmly within the theoretical parameters of the sociological school of jurisprudence, which treats legal rules as organically grown and socially tested normative orders and therefore does not accept the domination of legal absolutism or positivist.

A deeper analysis of ancient Indian legal culture yields a systemic, multifaceted truth inherent in *dharmic* law, which never developed the aspiration to rule from above in absolutist legal fashion but sought to rule from within the society and individuals.

Legal regulation from above, in the absolutist sense, may be apparently prominent, but there are deeper levels of legal regulation which can be ignored only at great cost. *Dharmic* law and its underlying philosophy and legal culture does not simply accept the simplistic impression that legal rules can solve all problems. In Indian cultural conceptualization, law is eternally and intrinsically connected with other and higher spheres and levels of life.[46]

It was the influence of the Hindu view of life, as given in the *dharmasastra*, that influenced the ruler and the ruled, and promoted their harmonious relations, and facilitated for both the moderation of their actions in accordance with the common ideals of coexistence. The best of all guarantees of good government in the *dharmasastra* was in bringing up the king and his ministers in the same ideals as the common man, and make both realize the supremacy of *dharma* as the both the letter and the spirit of the human law. It is only when human life is seen in the perspective of cosmic coexistence, and how important the self is as part of the cosmic reality and how all existence is interconnected in the common process of creation and transformation, that a proper sense of rules and values can be gained. The function and value of *dharmasastra* is to show the path to this realisation.[47]

India's legal culture or *Dharmic* law is alive and well at several conceptual levels of law, and it enables modern India's creative use of Indian concepts in seeking to construct a justice-focused legal system that does not need the crutches of a foreign legal order, but remains open to modification and reform as and when circumstances suggest it. Thus, to argue that the ancient Indians did not have 'law' would be plain nonsense. If indeed all human societies have law, why should ancient Indian societies be any different? The simple answer is that the ancient Indians conceived of law differently from Western cultures. *Dharmic law*, as is widely acknowledged, represents a culture-specific form of natural law.[48]

Both at the conceptual level and within processes of official law-making and policy formulation, concepts and rules of *dharmic* law retain a powerful voice in how India,

[46] Menski, 2003, p.42; Pal, 1958; Purohit, 1984; Spellman, 1964; Rocher, 1972.
[47] Aiyangar, 2018, p.180.
[48] Jayaswal, 2004; Dutt; 1979; Swain, 2004; Motwani, 1958.

in the 21st century, is seeking to achieve social and economic justice for over a billion people. It holds its position as a major legal system of the world, often despised and largely unrecognised, but massively present in the world of the twenty first century. At least a billion people, roughly a seventh of the world citizenry, remain governed by *dharmic* law in one form or another. Numerous decisions of the Supreme Court of India and the High Courts and subordinate judiciary bear witness to this social reality.

State law and *dharmic* law are not incompatible, both interact with each other in many ways that we cannot even begin to analyse. Indian traditions are manifestly much more than folkloristic decorations, and *dharmic* law is a demanding multi- disciplinary arena which seems to put researchers off. *Dharmic* law has always been much more than a fossilised book law that could be abolished by the stroke of a pen. It could not simply be reduced to redundancy in the Austinian fashion, that taught Indian leadership to embrace legal positivism as a philosophy and top-down law- making as a magic tool of development. Justice Katju has observed that in ancient and medieval India there was tremendous development not only in the fields of science and philosophy, but also in the field of law. However, he lamented that the advent of British rule denied us the benefits of these developments as the alien rulers made it a policy to demoralise and denigrate us by propagating the idea that Indians were a race with no worthwhile achievement to their credit.[49]

Rajdharma

The foregoing brief discussion will make it clear that the rules contained in the *dharmasastra* relating to *dharmarajya* as the force of law had their roots deep down in the most ancient Vedic tradition and that the authors of the *dharmasastra* were quite justified in looking up to the Vedas as a source of dharma. But the Vedas do not profess to be formal treatises on dharma; they contain only disconnected statements on the various aspects of dharma; we have to turn to the *smrtis* for a formal and connected treatment of the topics of the *dharmasastra*. Indian classical texts like the *Manusmriti*, and *Sukraniti*, which are in the category of *Nitisastra, Arthasastra, Dharmasastra*, *Tirukkural*, or *Dharmasutra* deal mainly with the specific topics implied by such categories as *Dharma* (morals), *Artha* (interests) and *Kama* (desires) as opposed to *Moksa* (salvation).[50]

Dharmasastra texts like *Manusmriti, Yagyavalkyasmriti* and *Sukraniti* reveal keen insight into the principles of strong and good government and political wisdom that find place in Indian texts of the time. These works are based on the principle that the security of the state depends not on the passive virtue of obedience to the laws promulgated by it but on the active cooperation of the people with it in carrying these

[49] Katju, p. 7.
[50] Buhler, 2008, 2018; Oliville, 2000; Lariviere, 1984; Lingat, 1973.

laws into effect. The structure and functioning of the Indian political system of these times has many points which have anticipated the latest principles of good governance administration and which have yet to be realised by modern States.[51]

In these texts the existence of conflicts, disunions, rivalry and factional spirit is considered to be the greatest of all dangers to social peace and political security. The bond of civil society is torn asunder when the moral system is disrupted. Hence the greatest political offender and the most criminal sinner is he who by his conduct promotes the breach between those who should normally live in amity and peace.

The general violence of criminal activity is seen in in hindu jurisprudence as the most insidious threat to the order of law. The main problem with violence is less the injury it causes to some person or group than the threat it poses to the state or other legal authority. *Sukraniti* provides against such offences by the socio-political decree issued by the king.[52] "According to the dictates of *Sukraniti* the execution of bad men is real ahimsa i.e., mercy. One is deserted by good people and acquires sins by always not punishing those ought to be punished, and punishing those who ought not to be, and by being a severe punisher".[53]

A state is a state because it can coerce, restrain, compel. If we eliminate control or the coercive element from social life, and the state as an entity vanishes. *Dharma* is the very essence of statal relations. No *danda,* no state. A sanctionless state is a contradiction in terms. The absence of dharma is tanta-mount to *matsya-nyaya* or the state of nature. It is clear also that property and dharma do not exist in that non- state. These entities can have their roots only in the state. The whole theory thus consists of three fundamental rules : no *dharma* or *sengol*, no state; no state, no dharma; and no dharma, no individuality and property.[54]

Manusmriti considers *dharma* to be a tremendous force for discipline, hard to be controlled by persons with undisciplined minds, it destroys the King who has swerved from duty, along with his relatives. Then it will afflict his fortress and kingdom, the world along with movable and immovable things, as also the sages and the gods inhabiting the heavenly regions. Therefore punishment shall be given appropriately to men who act unlawfully, after having carefully considered the time and place, as also the strength and learning of the accused. When meted out properly after due investigation, punishment makes all people disciplined and happy; but when meted out without due investigation, it destroys all things.[55]

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[51] (*Sukraniti,* p. 39-40).
[52] *Sukraniti,* p. 40.
[53] ibid. p. 13
[54] Sarkar, 1922, p. 197.
[55] *Manusmriti,* Vol.5, p.289-90.

Discipline cannot be justly administered by one whose mind is not disciplined, or who is addicted to sensual objects, or who is demented, or who is avaricious, or whose mind is not disciplined, or who is addicted to sensual objects. Discipline can be administered by one who is pure, who is true to his word, who acts according to the Law, who has good assistants and is wise. The King who metes out punishment in the proper manner prospers in respect of his three aims of virtue, wealth, and pleasure; he who is blinded by affection, unfair, or mean is destroyed by that same punishment.[56] In the same spirit, *Tirukkular* says that if the *sengol* of the king does not rest on justice, and if he acts without wisdom, he will see his wealth and prestige fade away.[57]

Having duly ascertained the motive and the time and place, and having taken into consideration the condition of the accused and the nature of the offence, punishment should be given to those deserving punishment. Unjust punishment is destructive of reputation among men and subversive of fame; in the other world also it leads to loss of heaven; he shall therefore avoid it. The king, punishing those who do not deserve to be punished, and not punishing those who deserve to be punished, attains great ill-fame and goes to hell.[58]

In the dharmasastra punishment emphasizes reformation and penance over punitive punishment. In fact, *dharma* in this view is what makes law effective at all as it contains a recognition of human imperfection and fallibility. Law and justice in its fullest sense can only exist in the world if *dharma* is there to rectify the inevitable failings of human beings. Without dharma, law remains a distant ideal to which no one can reach.

With *dharma* law becomes the truth that upholds social and individual righteousness. *Dharma* simultaneously guarantees the overall stability of the social system and development of the individual. In *Tirukkural*, the value of the word of the priest, and the value of the honour for men, is considered to rest on the value of the *sengol* held by the king.[59]

Dharmasastra is the double edged weapon that cuts both ways. On the one hand it rectifies anti-social behaviour of criminals, on the other it is an educative and civilizing agent. It is only by the administration of *dharma* that the State can be saved from a reversion to the rule of the jungle and mutual destruction and it is by dharma the people are set on the right path and they become virtuous and refrain from committing aggression or indulging in untruths. *Dharma* is effective moreover in causing the violent to become mild and the criminals to give up lawlessness. It is good also for leadership and can show them reasonable ways should they happen to be habitual of vanity or unmindful of their own behaviour. Finally, it is the basis or

[56] ibid. p. 292-93.
[57] *Tirukullar*, 57.
[58] *Manusmriti*, p. 282.
[59] *Tirukkural*, 55.

the ‘great stay of all virtues’ and all the ‘methods and means of statecraft’ which would be fruitless without a judicious exercise of dharma. Its use as a beneficent agency in social life is therefore unequivocally recommended by Sukra.[60]

Dharma is also a most powerful instrument of controlling the ruler himself and his administration. The misuse of dharma leads to the fall and destruction of the ruler. Dharmasastras do not hesitate to declare that *dharma* would hit the king who deviates from his duty towards the people of his kingdom. It would hit also his relatives together with his territories and possessions. The common good depends therefore on the judicious exercise of the *dharma*. Dharmasastra do not allow any uncultured or unruly man to be the administrator of *dharma*. The greatest amount of wisdom accruing from the help of advisors and others is held to be the essential precondition for the handling of this instrument.[61]

“*Brihadaranyaka Upanishad* declares that the ruler too is obliged to follow *dharma* on pain of sanction for infraction. *Dharma* was all encompassing from natural justice, to equality, to considerate treatment of all mankind and exhortation, to codetermination for betterment of humankind. Betterment of each individual is the raison d’etre for later societies to identify and recognise human rights as basic and inherent in humans”.[62]

In *dharma* we encounter on the one side interests of the State and on the other individual morality, virtue, dharma, etc. In fact, it is to educate man out of the primitive license and beastly freedom that government has been instituted. The State is designed to correct human vices or restrain them and open out the avenues to a fuller and higher life. And all this is possible only because of *dharma*. The conception of this eternal connection in individual and social existence is one of the important contributions of the political and social philosophy of the India to human thought. This concept changes the focus from what law controls to what law enables. It suggests that every legal system must contain morals and ethical elements which can be understood in religious terms.[63]

In accordance with the principle of *dharma*, the state is conceived as an educational institution or moral laboratory. It is an institution in and through which men's natural vices are purged, and it thereby becomes an effective means to the general advance of mankind. The Indian thinkers therefore consider the state to be an institution necessary to the human race if man is not to suffer in the condition of law of the jungle under the might of the animals. Man, if he is to be man, cannot do without social and political organization. He must have a state and must submit to sanction,

[60] Sarkar, 2016, p. 513-14.
[61] ibid.
[62] GOI, p.29.
[63] Sarkar, 2016, p.514.

enforcement and punishment — in a word, to *dharma*.[64]

There are recent studies that have proposed a link between social cohesion, religion, and law. Researchers have argued that participation in religious and cultural rituals strengthens group solidarity and improves social harmony. Recently, they have tested this hypothesis through both systematic field studies and laboratory experiments. Laboratory studies, for example, have shown that synchronous activities foster greater unity and more cooperation. This suggests that deep in our evolutionary history, social cohesion has been favoring social norms and practices that increased solidarity.[65]

While social rituals initially evolved to make face-to-face communities cooperative and cohesive, gradually these practices transformed for the scaling up of cooperation to larger imagined communities in which thousands of individuals interact, exchange, and cooperate. To help this degree of scaling up, researchers have argued that cultural evolution, by anchoring on human species' innate capacities to entertain the existence of supernatural agents, led to the emergence of increasingly powerful and morally concerned deities who monitor and punish non-cohesive or antisocial activities, such as murder, theft, or adultery.[66]

Over time, faith and beliefs about these supernatural forces evolved further to increase their effectiveness: Gods expanded their range of moral concerns (e.g., openness toward strangers), ability to monitor norm violators (e.g., mind-reading abilities, omniscience), and power to punish (e.g., controlling the afterlife). Here, consistent with models of social norms based on punishment, gods were turned into super punishers who could impose penalties in this life and the next.[67]

Researchers have shown that individuals from diverse cultures and traditions who report stronger beliefs in more powerful moralizing gods are more fair-minded in experiments with anonymous persons and more supportive of public goods. To examine whether supernatural agents can indeed cause people to behave more cooperatively, many studies have shown that when imbued with thoughts of god and specifically thoughts of supernatural punishment, believers become more fair-minded, cooperative, and honest with strangers. Together with historical and cross-cultural data supporting the claim that gods became increasingly morally concerned, powerful, and punishing over historical time, the psychological evidence suggests that certain religions may have evolved culturally in ways that have altered people's psychology and thereby permitted the cohesiveness of societies.[68]

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[64] Sarkar, *1922*, p.203.
[65] Henrich, 2016, p.230.
[66] Norenzayan et al. 2019, p.2; Lombard, 2022.
[67] Purzycki, p.1.
[68] Henrich, ibid.

Conclusion

In their quest for perfection in individual conduct and social order, Indian thinkers explored and prescribed the ways of good conduct of individuals, and arrangements for considerable degree of social cohesion by balancing harmonious coexistence and individual autonomy. Flowing gracefully with skill and brevity in poetic expression, the insightful revelations of Vedic sages blended intuition, philosophy and conviction to explore and conceptualise a macrocosmic order of high moral and social conduct in which individuals and societies could grow and flourish in the path of justice through willing obedience to the laws of nature and society.

A golden thread of the spirit of justice inspired the *dharmasastra* texts and the institutions of legal systems to internalise the high moral and cosmic order. The availability of a diversity of adjudicating mechanisms to suit the location and profession of the litigants and serve the people in their own intimate environment, collegiate character and strict impartiality of courts and simplicity of procedure were the predominant features of the legal and judicial system given in the *dharmasastra*.

The approach of the *dharmasastra* of combining truth with justice, equity with law and discretion with reason has a universal message for modern law and jurisprudence. The law and justice system in ancient India was influenced by a *dharma* based understanding of justice as the expression of the absolute reality. The persuasion of all human beings to do good and avoid evil was the means chosen by the *dharmasastra* for conformity to a high moral and social order. Although these systems were a product of their times they have an abiding value for truth and justice in contemporary human society.

The Vedic conception of law is very different from the positivist of modern law. The positivists divide reality into that which we can say clearly and the rest, which we can better pass over in silence. But what we can say clearly amounts to next to nothing? If we omitted all that is unclear we would probably be left with completely uninteresting and trivial repetition of words. By paying too much attention to what we perceive with our senses, positivists lose connection with the essential values of human life.

Positivist view assumes that in the work of arguing and deciding cases in thousands of courts the judge and the lawyer can easily and clearly comprehend and describe the process they follow. Nothing could be farther from the truth. Sources of information, applicable precedents, logical consistency, prevailing custom, personal understanding of justice and morals, all these and more elements enter in varying proportions to make the strange compound of judicial process. Judicial process, is uncertain, entangled, complementary, emergent and creative. Like other branches of administration, it arrives at decisions by the logic of probabilities rather than the logic of certainty.

The belief regarding the existence of a fact is thus founded on a balance of probabilities. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. The concepts of probability, and the degrees of it, cannot be expressed in terms of units which constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof.

Vedic concept of law embodies both the notion of justice, equity and good conscience as well as powers of the judges to craft outcomes that ensure a just outcome and effect complete justice. The demands of justice require a close attention not just to positive law but also to the silences of positive law to find within their intersections, a solution that is equitable and just. In Vedic tradition, the judges were empowered to do 'complete justice' without being always bound by the provisions of procedure. This power was undefined and uncatalogued, to ensure elasticity to mould relief to suit a given situation. The fact that the power was conferred only on the knowledgeable judges of good conduct and conscience was an assurance that it would be used with due restraint and circumspection.

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Hindu Law in Greater India

Ancient Roots of Indigenous Law

Sunil Sondhi

Abstract

The idea that justice and good conscience must prevail over law reflects the notion of superiority of higher moral law over the limitations of man-made law. In India this is rooted in the fundamental Vedic principle that there is connection between the form and the formless, mundane and the divine, the means and the ends. As the Rig Veda says, amidst the undifferentiated source, great warmth of creation was born; and the sages who searched in the far reaches of their mind discovered the umbilical connection of manifest with the unmanifest.[1]

This holistic, creative and contextual view of Dharma and Dharmasastra is also evident in the countries which were influenced by the Indian Dharmasastra tradition. In Indonesia, Vietnam and Cambodia, the Dharmasastra tradition was accepted largely in its original form, although as the Kutara Manava Dharmasastra of Java shows, some modifications were made. In Tibet, Burma, Thailand, and Ceylon, the indigenous texts were an attempt to use the Indian tradition as a model in an environment entirely given over to the Buddhist faith.

They retained the textual classification of contentious matters into Vyavaharapada or eighteen types; but the content of the texts was very much a matter of local rules. Thus, the Dharmasastra were not transplanted in other countries by the force of arms; rather, these were accepted as a guide to form and sustain indigenous traditions of ethics and law.[2]

On the basis of the considerable evidence from ephigraphical, and textual sources, it is possible to suggest that by the time Indian-inspired temples, statues and epigraphy appeared in Southeast Asia, sometime between the third and the fifth century CE, the relationship between Southeast Asian and Indian societies had probably already come a very long way through mutual interaction and awareness of the universal nature of India's knowledge tradition.

[1] RV, 1.164. RV, 10.129.
[2] Hooker, p.217.

We need to go beyond the imagined vision of a sudden imposition of Indian culture, and Indianisation or Colonisation of South and Southeast Asia by warriors and sages.[3] In a way, this paper raises the question as to whether Greater India was culturally Indianised through dissemination of India's knowledge tradition before social and political 'Indianisation?'

Introduction

The *Dharmasastra* texts are the products of different and widely separated ages from around 500 B.C. to 500 A.D.[4] A few of them are very ancient and were composed more than two thousand five hundred years ago. Such are the *Dharmasutras* of Gautama, Apastamba, and Baudhayana, and the *Manusmrti*. These were followed by such *Dharmasastra* texts as the those of *Yajnavalkya*, Parasara, Narada. All these smrtis are not equal in authority. If we are to judge of the authority of a text by the commentaries thereon, then the *Manusmrti* stands pre-eminent. Next to it is the *Yajnavalkya*smrti.[5]

In this context, the relationship of *Dharmasastra* with the epics, *Arthasastra* and the *Nitisastra* needs to be understood. The *Mahabharata*, *Arthasastra* and *Nitisastra* which are also concerned with the rights and responsibilities of the ruler and the ruled may be seen as connected and supplementary texts of *Dharmasastra*. While works on *Arthasastra* and *Nitisastra* enter into great details about governance in all its aspects, *Dharmasastra* texts and *Mahabharata* generally deal, in part, with salient features of governance essential for protecting dharma.[6] Ramayana and Mahabharata has been found to have hundreds of verses that refer to the principles of *Rajdharma* which is part of the *Dharmasastra*s, *Nitisastras, Dandaniti* and other works.[7] Though *Arthasastra* and *Dharmasastra* are often considered separately on account of the difference of the two sastras in ideals and in the methods adopted to reach them, *Arthasastra* may be seen as a branch of *Dharmasastra* as the former deals primarily with the responsibilities of kings for whom rules are laid down in the *Dharmasastra*.[8]

The terms *Arthasastra* and *Nitisastra* are applied to the study of government from two different points of view. When wealth and prosperity of all kinds is the spring and motive, the science treating these is called *Arthasastra*. *Nitisastra* prescribe means whereby people are prevented from leaving the right path. The Nitisasra of Kamandaka acknowledges its debt to *Arthasastra*. The Pancatantra holds that

[3] Manguin, p. xx.
[4] Kane, I, 304.
[5] Ibid., I, 306.
[6] Jois, ibid., 112-113.
[7] Banerji, 1972; Sircar 1973.
[8] Kane, I, 158.

Arthasastra and *Nitisastra* are synonymous. The Mitaksara commentary on *Yajnavalkya*smrti remarks that the *Arthasastra* referred to by *Yajnavalkya* is *Rajanitisastra* that is part and parcel of *Dharmasastra*.[9]

There is little doubt that there seem to be diversity of doctrines between and within the *Dharmasastra*. These apparent contradictions result from a misunderstanding of different meanings of Dharma. The contextuality of Dharma makes it possible to state a series of different rules, for different places and times for the same person.

For instance, false evidence given by a witness can lead him to darkness of hell.[10] Sometimes, false evidence becomes a divine assertion.[11] Similarly, he who commits violence is regarded as the worst offender,[12] but the one who strikes in the cause of right incurs no sin.[13] Also, one should forsake wealth and desires, if it violates *Dharma*, but even Dharma if it is inhumane or may cause suffering in future.[14] *Dharmasastra* is to be obeyed for the sake of human wellbeing not for its own sake.

In view of such contextual differences in the application of *Dharma*, rational interpretation of *Dharmasastra* is suggested. *Manusmriti* says that if a man explores, by reason, the Vedic teaching regarding *Dharma*, he alone, and no other, understands *Dharma*.[15] *Brihaspatismriti* categorically rules that if a decision is arrived at without reasoning and considering the circumstances of the case, there is violation of dharma.[16] *Naradasmriti* says that it becomes necessary to a adopt a method founded on reasoning, because social context decides everything and overrides the sacred law.[17] *Arthasastra* also says that if sastra comes in conflict with any rational and equitable ruling then the latter shall be the deciding factor beyond the letter of the text.[18]

Dharmasastra is not a closed discourse that has no place for correction, adaptation, or innovation on contextual and rational basis. Rather, openness, creativity and an adaptive response to emergent social problems and circumstances is built into the very structure of not only *Dharmasastra* but also *Arthasastra* and *Nitisastra*.

Multiplicity and contingent nature of views expressed in different *Dharmasastras* helped contextual application of plurality-conscious universalistic principles. The *Dharmasastra*s are essentially "rules of interdependence" founded on diversity and unity corresponding to the nature of things and necessary for the maintenance of the

[9] Kane, III, 8.
[10] Manusmriti 8.94.
[11] Ibid., 8.103.
[12] Ibid. 8.345.
[13] Ibid. 8.349.
[14] Ibid. 4.176
[15] Ibid., 12.106.
[16] Brihaspatismrti, 2.12.
[17] Naradasmriti, 1.40.
[18] Arthasastra, 3. 1.45.

cosmic and social order.[19]

Burma

The *Dharmasastra*s have exercised deep influence on the development of indigenous law in Burma, Thailand, Tibet, Ceylon, Indonesia, and Cambodia, which remained visible in their legislation till the modern times. In all these countries, the name of Manu has been associated, as in India, with the origin of the law.[20]

Burmese legal scholars have followed the *Dhammasattha* and attempted to trace the legal development of Burma beginning from the first *Manu Dammasattha* (*Dharmasastra*) written at the time when this world emerged according to Burmese mythical tales and stories. Among the Burmese *Dammasatthas,* the *Manu Dammasattha* is the first of around forty *Dammasatthas*. Throughout Burmese history, the *Dammasatthas* are the fundamental sources of laws. In the introduction of *Manu Dammasattha*, the foundation of the source of law in Burma is described:

When this universe had reached the period of firmly established continuancy, the original inhabitants of this world conjointly entreated the great king Mahasamanta to become their ruler. King Mahasamanta governed the world with righteousness. Now the king had a wise nobleman called Manu, who was well versed in the law.

This nobleman called Manu, desiring the good of all human beings, and being also opportuned by King Mahasamanta, rose into the expanse of heaven, and having arrived at the boundary wall of the world, he there saw the natural law, Dammasattha, he committed them to memory and having returned, communicated the same to the King Mahasammata, stating eighteen branches of law.[21]

Burmese law existed for long without much break and changes but steadily preserved the spirit of Dammasatthas. This view was supported by the Letters Patent of the appointment of judges in the last days of Burmese monarchs in 1885 as given below:

In case of dispute they must, in accordance with all thirty-six Dammasatthas, enquire into the causes of the people and decide between them and for this purpose they are appointed to the Courts as judges. In a lawsuit or dispute any of our subjects apply to a Judge, the Judge shall decide the matter with the Manu Dammasattha in hand first. If the required rule is not to be found therein, follow all other Dammasatthas.[22]

The development of Burmese law is rooted in all *Dammasatthas* written by different legal scholars appointed by different kings throughout several eras of Burmese kings.

[19] Ibid. p.216.
[20] Lingat, Budhist Manu, p. 284.
[21] Myint, p.20.
[22] Ibid.

These *Dammasatthas* were restored one dynasty after another and observed by one king after another. By this observance, the kings gained people's support and respects throughout Burmese history.

This *Dhammasattha*m literature is not known very accurately. As a matter of fact, we know-it only through Burmese versions or Burmese juridical literature of a much later period than the original Pali works. Fortunately, Burmese law is much better known due to the research undertaken by Sir John Jardine, British Commissioner for the Administration of Justice in Burma, and by E. Forchhammer, a German archaeologist appointed by the British Government in 1881 as head of the Archeological Service of Burma. Dr. Forchhammer recorded the result of his research work in a book published in Rangoon in 1885 under the title 'Sources and Development of Burmese Law'**.** It is still the only original work in English on this text. Forchhammer's conclusions have been generally appreciated by all those who have dealt with it.[23]

In his study of Wagaru *Dhammasattha*, Forchhammer observed, "That Burmese law is Indian law is an inference drawn from the discovery of analogies between the enactments and dicta of the modern Burmese law books and the Hindu law as contained in the *Dharmasastra*s of the various Hindu schools setting forth Hindu law and usage. If the term " Hindu law " is defined as representing collectively the sastras of the six schools of Hindu law and recorded usages of Hindu communities, the term " Indian law " should in this essay be understood simply as law of Indian origin, leaving it for the present undecided whether it was introduced into Burma in ancient or modern times".[24]

Wagaru *Dhammsattha* shows its Indian origin right from beginning, by the mythical introduction about the first creator, Manu, who is here transformed into a sage advisor of King Mahasamanta, who rose to heaven and saw the law written in characters of the size of a grown-up cow on the boundary wall of the universe. But these analogies in the *Dhammasattha* are not restricted to *Manusmriti* or any other particular *Dharmasastra*. They extend over *Dharmasastra*s of the various times, from the *Dharmasutras* to the later Smrtis, such as *Brhaspritismriti*., *Katyayanasmriti*, and also include *Mahabharata*.[25]

Forchhammer carefully compared the legal rules in the Wareru Code with those of Indian *Dharmasastra*s of Manu, Yajnavalkya, Narada, Katyayana, and even *Dharmasutras*. He quotes many of them, which may be found substantially the same in the Indian codes.[26] There are indeed very few passages in the Wagaru which are not clearly and distinctly Hindu law as contained in Manu and other ancient Codes. It

[23] Lingat, p.286.
[24] Forchhammer, p.1.
[25] Jolly, op.cit.
[26] Lingat, p. 287.

cannot he denied that the Wareru Code is related to the *Dharmamasastras,* especially to the two texts, the *Manusmrti* and the *Naradasmrti*. This kinship is plainly shown, not only by the same division of the judicial matter into eighteen branches, but also by the numerous similarities and corresponding points. On many respects, the Wareru Code looks as an epitome of Hindu Law.[27]

The *Dhammasattha,* of which the Code of Wagaru gives us an idea, in spite of the late date of the version which has come down to us, has managed to hazard the introduction or perhaps rather the conservation of the Indian system in environments practically cut off from India and entirely won for the Buddhist faith. That their authors were inspired by Indian *Dharmasastra*s is beyond doubt, for it is evidenced by their classification of contentious matters into eighteen types, corresponding to the eighteen titles of litigation in the *Dharmasastra*s.

It is clear that the Manu of *Dhammasattha* has no more than the name in common with the Manu of the *Dharmasastra* even though some *Dhammasatthas* make out of him a son of Brahma, reincarnated in the person of a hermit. But it is also evident that the name was not chosen at random. For the Buddhists, the law of Manu is really the law of the phenomenal world, that which governs laymen. It is independent of the law which the Buddhists teach to the world.

*Dharmasastra*s reveal to men the conditions of social interdependence and welfare, while the law of the Buddha reveals to them the conditions of salvation. Despite this dichotomy, which has remained one of the characteristic traits of Buddhist society, the law of the *Dhammasatthas,* like the law of the *Dharmasastras,* is above the world which it rules. *Dhammasattha* is also bound to the cosmic order and is therefore free from the will of men, who will live in peace only so long as they obey its precepts. A king like Mahäsammata himself could introduce no changes into it, and his role is confined to insuring that it is respected.

*Dhammasattha*s were popularised through prolific production, written most frequently in the vernacular, in which local traditions held a greater and greater place, and where borrowings from the Buddhist scriptures became more and more numerous. In this new guise the *Dhammasattha*s lost their original nature. All repeat and embellish the story of the marvellous discovery of the text of the law, and base their precepts on the revelation of the sage Manu. This literature is abundant and, unlike India, the circulation in public has proliferated.

There is a list enumerating a hundred *Dhammasattha*s composed in Burma, and forty of them still exist.[28] Like the *Dharmasastra*s, their chronological succession is uncertain: they copy each other, and also complete and differ from each other. It is

[27] Ibid., p. 289.
[28] Lingat, 1940, p.14.

from the totality of them that the rule of law must be extracted. However, in contrast to the Indian position, the commentaries of the *Dhammasatthas* are mixed with the texts and do not appear as independent works until the modern period, when the form of doctrinal treatises emerges.

A "digest" has however been compiled at the request of the British. But up to our own time the *Dhammasatthas* have remained the only written law on all questions relating to the personal law of Burmese Buddhists, even though a project of codification has recently been mooted.

The Burman kings, like the British authorities, took care not to legislate in the sphere of the law of Manu and confined themselves to their role as judges. As in the Hindu system, the precepts of the *Dhammasatthas,* while certainly being authoritative, are not imperative in the manner of the rules of *Dharmasastra*.

Indonesia

Among the bodies of traditional knowledge and learning that came to the Indonesian archipelago from India in the early centuries of the common era is a complex of textual traditions that can be broadly described as 'legal' literature. In ancient Java (until the end of the fifteenth century) and precolonial Bali (until the twentieth century), concepts of law not only encompassed the codification and administration of civil and criminal justice but also concepts of morality and right conduct (*dharma*) that mirrored the broad definition of dharma known in ancient.[29]

The ancient Indonesian legal judicial system was undoubtedly influenced by the *Dharmasastra* texts as available in Bali. As in India, the core contents were a specialized body of written knowledge, and a set of procedures by which crimes could be tried and the guilty punished. These two aspects of judicial practice were embodied in the ancient Javanese legal texts in use throughout Bali till the nineteenth century. The heritage of textual knowledge, and the human exercise of justice by the ruler, both essential aspects of the *Dharmasastra,* led to the evolution of law in Indonesia.

It is possible that a number of legal traditions and authorities were known from digests and compendia and may have spread to Java and Bali in that form rather than as discrete texts. Although the earlier stages are undocumented and thus remain obscure, by the twelfth century, legal authority in Java and Bali was firmly vested in traditions drawn principally from the Sanskrit *Manava dharma sastra*.[30]

That the reception of Indian law in Java must have been accomplished already in the tenth century A.D., is proved by a copper-plate discovered there which contains a verdict of the court *(jayapattra)* composed quite in agreement with the rules laid down

[29] Creese, p. 243.
[30] Ibid.

by later Indian *Dharmasastra* texts such as *Brhaspatismriti*.[31]

Javanese lawbooks demonstrate that, as with other Southeast Asian law texts, the basic concern of the text is connections between religion, law, and Man's view of himself in relation to the natural world. Indian influence in the text was both direct and immediate, in that many sections were either copies of or adaptations of Indian material-usually, though not always, from Manu. The Lawbooks was made known "for the well-being of humanity." More important, the spirit and tone of the text owe much to Indian legal thought; the philosophical basis of order, and its connection with religious philosophy, is unmistakenly Indian. At the same time, the text demonstrates a number of adaptations to local conditions, such as the emphasis upon compensation and the avoidance of varna rules.[32]

The legal system of Java was mainly of Hindu origin, though modified by local conditions. There were written law-codes in Java and Bali, and these resembled the Indian Law-books—*Dharmasastra*s or Smrtis—to a large extent, both in form and substance. The variations of rules and principles noticed in different law books must be attributed, as in the case of India, to varying indigenous customs in different localities and in different ages. To this we may perhaps add the influence of the different Indian Law-books introduced, perhaps at different times, in Java.

Manu's authority is cited as the basis of juridical decision-making and moral guidance in Javanese and Balinese epigraphical and textual sources dating back to at least the twelfth and, in the case of the latter, possibly even as early as the ninth century. Other prominent Sanskrit legal authorities linked to the *Arthasastra* traditions associated with the science of politics, kingly strategy and judicial procedures on which Manu also drew are specifically referenced in the corpus of indigenous sources, including the compendia attributed to *Chaṇakya*, adviser to the founder of the Mauryan dynasty Chandragupta as well as works by Manu's successors, such as *Bṛhaspati* and *Kāmandaki*, author of a core *Nitisastra* text, the *Nitisara*.[33]

The earliest reliably dated epigraphical references to Manu's code in the Indonesia come not from Java but from Bali, where the *Manawasastra* is noted as the basis of legal judgements in three inscriptions issued by the twelfth-century Balinese ruler Jayapangus. According to the preamble in each of these inscriptions, King Jayapangus drew his prudent and wise conduct from 'the essence of Manu's teachings' and also from the *Kamandaka Nitisara*. Literary references to the *Kamandaka* appear predominantly in later texts, including some Balinese works dating from after the end of the Majapahit period, pointing to the presence of a long- standing and resilient

[31] Jolly, p.94.
[32] Hooker, p.215.
[33] Ibid. 244.

'*Kāmandaka*' tradition in Bali that may have come directly from India.[34]

The major ancient Javanese legal texts still in use in Bali in the nineteenth century and recognised in both the textual record and the reports of Dutch and British colonial officials include the *Pūrwādhigama*, *Kuṭāramānawa, Sārasamuccaya*, *Swarajambu*, *Adhigama*, *Dewāgama* and *Dewadanda*. All these law codes comprise a collection of definitions of various criminal and civil offences and their penalties relating to matters such as theft boundary disputes, debt bondage and contracts, verbal and physical assault, abduction, divorce, and adultery. Included among the regulations are definitions of righteous conduct to be followed in all social relationships.[35]

Among the texts mentioned above, the *Kutaramanava*, which is held authentic in Bali, has been of primary significance in the study of the Javanese law. The book was regarded as an authoritative document in the period of the Majapahit empire during which the evolution of Javanese law was most prominent as it became necessary to codify law to meet the needs of administration of far flung territories. The legacy of the Majapahit Kingdom includes statues, literary books, inscriptions, temples, and the *Kutara manawa Dharmasastra*.

The *Kutara manawa Dharmasastra* is a book of legislation used by the Majapahit Kingdom which regulates various aspects of social life.[36] The statutory code of the Majapahit Kingdom, written in the ancient Javanese language and known as the *Kutara manawa Dharmasastra*, is a legal document that regulates criminal law and civil law. In order to provide an overview of the matters regulated in the law, it was reorganised into various chapters.[37] This is evidenced by the Bendasari inscription dating from the middle of the fourteenth century A.D. It is a record of a judgment in a civil dispute over the possession of land and describes the way in which the judges came to a decision.[38]

In this case after hearing the statements of both the parties, and in accordance with established practice, the judges interrogated some impartial local people witnesses about the dispute. Then they took into consideration the law, as enunciated in legal texts, the local usages and customs, the precedents, and the opinions of religious

[34] Ibid. P.245.
[35] Creese, p.246.
[36] Utami, p.1502.
[37] The following is the result of that rearrangement effort: Chapter I: General provisions on fines Chapter; II: Eight kinds of murder, called astadusta; Chapter III: Treatment of servants, called kawula Chapter; IV: Eight kinds of theft, called astacorah; Chapter V: Compulsion or sahasa Chapter VI: Buying and selling or adol-tuku; Chapter VII: Pawn or sanda; Chapter VIII: Debt or ahutang-apihutang; Chapter IX: Entrustment; Chapter X: Dowry or tukon; Chapter XI: Marriage or kawarangan; Chapter XII: Mesum or paradara; Chapter XIII: Inheritance or drewe kaliliran; Chapter XIV: Cursing or wakparusya; Chapter XV: Hurting or dandaparusya; Chapter XVI: Negligence or kagelehan; Chapter XVII: Fight or atukaran; Chapter XVIII: Land or bhumi; Chapter XIX: Slander or dwilatek. Ibid.
[38] Majumdar, 1936, p.447.

teachers and old men, and ultimately decided according to the principles enunciated in *Kutara-manava*. That the *Kutara-manava* was regarded as an authoritative document also follows from another inscription, dated 1358 A.D. in which the judges, seven in number, are described as '*Kutara-Manavadi-Sastra-vivechana-tatpara'*, i.e., persons skilled in the knowledge of '*Kutara-manava* and other lawbooks.[39]

An analysis of the contents of the Javanese Lawbook Kutara-manava shows that Manava*Dharmasastra* formed its main source. Not only numerous isolated verses, but sometimes a whole series of them, are reproduced, with slight variations and modifications in many cases. These variations were in some cases undoubtedly due to an effort to bring the law into line with Javanese indigenous customs and laws.

But the connection is unmistakable.[40] This quite inevitable and understandable, particularly in view of the fact that the Indian *Dharmasastra* also recognise the importance of local customs and rules. Variations from the texts, based on reason and fairness, are essential for providing complete justice.

Javanese legal textual traditions, with their roots in the *Dharmasastra* influenced evolution of law and jurisprudence Indonesian, and it remained the backbone of judicial processes in Bali until the transition to colonial administrative practices at the end of the nineteenth century. This indigenous legal tradition was influenced by the *Dharmasastra*s, particularly the Manusmriti, which were interpreted and redefined through centuries of local adaptation and development.[41]

Sri Lanka

Historically, Sri Lanka has been a multi-ethnic society. The Veddas, who transmigrated to Sri Lanka from the Indian subcontinent prior to the 6th century BC, were the island's aboriginal inhabitants. Ethnically, they are allied to the peoples of southern India and to early populations in South Asia. They adopted Sinhala and now no longer speak their own language. The Sinhalese succeeded in establishing the first kingdom between the fifth and third centuries B.C., which continued, with changes in dynasties, until it finally was colonised by the British in 1818. In the course of their history, they developed their own legal system, which is called *Kandyan* law after the name of their last dynasty, and it still remains indigenous law of the Sinhalese.[42]

The similarities between the *Kandyan* law and the ancient Indian legal tradition are too obvious to be ignored. The *Kandyan* Law relating to slavery is similar to the Hindu law, so far as the latter may be ascertained from the *Dharmasastras,* records of customs and inscriptions. The nature of slavery itself, and the means of liberation; the

[39] Ibid.
[40] Ibid. 449.
[41] Creese, p. 282.
[42] Chiba, 1993, p. 204.

method of becoming a slave, and the status of children of slaves; the rights of slaves to own property, and their passing as part of the estate of their deceased owner, all these find comparable rules in both systems. The *Dharmasastras* takes a different view of the effect of liaisons with slaves, but this would appear to be a reforming rather than a customary principle.[43]

There appears to be hardly any feature of the Sinhalese king which would distinguish him from the Indian counterparts. Election, succcssion, nomination of heir apparent, subjection to law, absence of legislative power, owner- ship of all land, exaction of services from the people; source of honours and appointments, ownership of minerals and treasures, entitlement to fines, source of justice: all these characteristics have their Indian parallels. The right to take property by right and to forfeit tenures for default of services are rights enjoyed by both the Indian and Kandyan King. All this is not to suggest that some divergences did not exist, or that Kandyan Kingdom had no peculiarities. It would be strange if it had not. The peculiar isolation of the Sinhalese made it almost inevitable that some special customs should emerge there. Yet, in so many small matters the Kandyan king resembled his Indian counterpart. The king's willingness to patronize more than one religion was also a feature that was characteristically Indian.[44]

The uncertain character of civil cases in Kandyan Law reflects the vague character of that chapter in the *Dharmasastra,* and this can hardly be a coincidence. The great similarity between the two systems on the issues of contracts and indebtedness, the feature of self-help, the thin division between civil and criminal law, the special function of the king in repressing crime, but his indifference to tortious wrongs, the feature of compensation, of restitution *plus* fine *plus d*amages, the objections to sorcery, the gradation of crimes and the gradation and types of punishment-in all these contexts *Dharmasastra* parallels are very generally forthcoming. All the details do not tally-for example, taking animal life was not a crime in Kandyan kingdom but it was invariably an offence in India-but the characteristic features are almost identical. In particular we must notice the notion that fellow villagers were collectively responsible for crimes committed in their area, and that the king must compensate the wronged party.[45]

On the other hand, the Tamils established an independent Jaffna Kingdom after immigrants from southern India occupied the northern area of Sri Lanka between the thirteenth and fourteenth centuries. The indigenous law of the Jaffna Tamils with some variations with the caste structure is known at present as *Thesavalamai*. Both legal systems are truly of different origin and history, but they clearly belong

[43] Derrett, p.138.
[44] Ibid. p.140.
[45] Ibid. p.141.

commonly to the basic Indian legal culture represented by the *Dharmasastra* which was also adopted with variations in countries like Burma and Thailand.[46]

As the Tamils established a settlement of their own people in the interior of the island, and introduced amongst them the same form of government, the same laws, and the same institutions as prevailed at that time in their native country. It further appears from the ancient sources, and from modern historical accounts, that this form of government, and these laws and institutions, had never been altered or modified by any foreign conqueror, but had continued to prevail in their original state, from the time they were first introduced into the interior of Ceylon, till the year 1815.[47]

The rules in the *Thesawalamai* closely resemble the customary laws prevailing in the parts of India, and traces of a common origin of the rules in the *Thesawalamai* and the Hindu Codes are easily discernible. According to the *Thesawalamai* a distinction is drawn between hereditary property, acquired property and dowry which respectively correspond to ancestral property, self-acquired property and s*tridhanam* of the Hindu Law although the incidents attaching to each of these may not be the same under the two systems. The hereditary property goes to the sons and the *stridhanam* to the daughter according to the *Thesawalamai* as under the Hindu Law. Marriage among the Brahmin Tamils in Ceylon has the same essential features as it has in Southern India. The marriage is celebrated when the children are too young to form an opinion and no divorce is possible. A woman can marry once and cannot make another alliance even after the death of the husband.[48] In the case of some other castes, however, divorce seems to have been recognised. Adoption is recognised as an institution as under the Hindu Law. A perusal of the *Thesawalamai* shows that many of the rules contained therein find their counterpart in the Hindu law. The reference to the Law of Malabar frequently made in the Thesawalami is apparently akin to the Hindu Law as prevailing in Travancoe. Thus according to these instances cited by several writers the *Thesawalamai* and the Hindu Law have had a common origin. They both sprang from the customary usages of the people of India.[49]

Thailand

The influence of *Dharmasastra* spread much farther beyond Burma towards the east and the south. In Siam there is found the tradition of a law-book of *Manusmriti*, and the extracts which were published in the first volume of the Journal of the Indian Archipelago (1847) from a Siamese law-book of 1614 A.D. It contains much that is Indian. The Pali customs and usages at the conclusion of a marriage ceremony, the rule that the interest in case of a debt should never exceed the amount of the capital,

[46] Ibid.
[47] D'Oyly, p.1.
[48] Tambiah, p. 6.
[49] Ibid., p. 7.

that the King inherits a property for which there is no legal heir, that the boys should be brought up in traditional values, the long list of inadmissible witnesses, etc. are clearly of Indian origin.[50]

This *Dhammasattha,* originally written in Pali, purports to be of Mon origin. It seems to have been known to the Thai peoples settled in the Menam basin before the foundation of the Ayuthia kingdom (1350), and it is possible that within its surviving version many works of the same type have been fused. We find there king *Mahasamanta* and his minister Manu (called *Manosara*), and the text is given by rehearsal on Manu's part from what he read on the wall which surrounds the world. But it marks an important piece of progress in juridical technique by means of the new divisions and distinctions which it introduces.

For example, contentious matters, instead of being reduced to the classical 18 titles of law, are classified under 39 rubrics, 10 being rules of procedure and 29 rules of substantive law.[51] But the most important novelty is the appearance, beside these fundamental rules *(mula-attha),* of a new source of law, constituted by the "ramifications of litigation" *(sakha-attha),* i.e. rules derived from the first. The fundamental rules are those which the hermit Manu (or *Manosar*a) read on the *cakkavala* and are found set out in the *Dhammasattha*.

They are the expression of the eternal law which should inspire *Mahasamanta* and future kings when giving justice to their subjects. As for the derivative rules, these resulted, in course of time, from the application by *Mahasamanta* and his successors of the principles laid down in the *Dhammasattha*. They could not be actually enumerated, although the fundamental rules are necessarily limited in number.

Thus the Thai *Dhammasattha* recognised in advance that there may be a legal value in decisions passed by kings in conformity with its precepts. A procedure is expressly provided for the transformation of a royal decision into a rule of law. They must be stripped of the features which gave rise to them, and reduced in abstract terms to the concise form of the precepts of the law.

They could then be added to the text of the *Dhammasattha* itself under the relevant rubric. It seems that such a procedure was actually followed during the Ayuthia period at every change in the reign, when it was entrusted to members of the High Court of Justice, composed principally of Brahmins versed in the science of law. The corpus of the old Siamese laws presents, therefore, a partially finished codification, in which the derivative rules of law, forming as many articles, are classified under the various rubrics of the *Dhammasattha,* after a brief account of the fundamental rules.

[50] Jolly, p.93.
[51] Masao, p.15.

In this way they assist and illustrate the teaching of the *Dharmasastra* which exhort the king not to judge lightly, and to pay careful attention to the presumptions of fact, not to speak of indirect methods which may be utilised in criminal matters. But these are only the necessary qualities of justice, equity and good conscience which they seek to develop in the judge, qualities needful if one is to try the case well.[52] The evolution of law towards a system having a legislative aspect was thus already suggested by the *Dharmasastra* themselves, insistently warning the king that a judgment is not just unless it is given in conformity with the precepts of the *sastras*.

Cambodia

The large number of Sanskrit inscriptions recovered in Kambuja and Champa show the prevalence of use of Sanskrit texts in ancient Cambodia. These inscriptions refer to many Sanskrit texts in grammar and philology, philosophy, politics, and economy, and this indicates the zeal and enthusiasm with which all classes of people high and low, took to the study of Sanskrit texts.[53]

These inscriptions give clear evidence of a thorough knowledge of almost all the Sanskrit metres and the most abstruse rules of Sanskrit rhetoric and prosody, intimate acquaintance with various branches of literature such as Veda, Vedanta, Purana, *Dharmasastra*, Buddhist and Jain literature, different schools of philosophy, and Vyakarana, specially the works of Panini and Patanjali. Specific reference is made to the famous medical treatise of *Susruta*, and to the most prominent text in *Dharmasastra*, the *Manusmriti*, from which a verse is actually quoted.[54]

An inscription from Champa dated 1081 AD, says that the king, “was fully endowed with all the qualities viz. the knowledge of 64 *kalas* (arts). He knew and practised the four expedients viz. conciliation (*sama*), gifts (*dana*), discord (*bheda*) and punishment (*danda*). He maintained all the eighteen titles of law and the uniformity (of procedure). He acted like visible *Dharma* in this world”.[55] Another inscription dated 1088 AD says that the king follows, “the three objects (*trivargga*), wealth (*artha*), virtue (*dharma*) and pleasure (*kama*), without showing preference to any.

He follows the four expedients viz. conciliation (*sama*), gifts (*dana*), discord (*bheda*) and bribery (*upapradana*) with respect to the enemies, the friends and the neutrals. He followed the eighteen titles of law prescribed by Manu (*Manumarga*).[56]

In yet another inscription dating back to fifth century, a king Devanika, perhaps a Cham conqueror, was installed in supreme power by "the blessed Sri Lingaparvata,"

[52] Dikshitar, p.218.
[53] Majumdar, 1961, 443.
[54] Ibid. 1953, p.106.
[55] Majumdar, p. 165.
[56] Ibid. 172.

the natural *linga* that dominated the region. He then resolved to create a *tirtha* in the form of a tank. He gave his tank the name of "Kuruksetra." He undoubtedly had in mind the "Kuruksetra" of the epic, for verses from the epic concerning "Kuruksetra" are quoted in his inscription. The inscription states: "May the celestial fruit, proclaimed formerly in the Kuruksetra and celebrated by the Devarsi, find itself here in the new Kuruksetra; ... may the fruits obtained in the thousand *tirtha* of Kuruksetra find themselves present here and complete."[57]

These inscriptions illustrate the categories of phenomenon and concepts that would have allowed the people of Cambodia and Vietnam to identify their own known facts and experiences within the framework of experience assumed in the *Dharmasastra* to be universal. For most things important and familiar in Cambodia and Vietnam, people were able to invoke Indian texts as ratifications of what they already knew to be true. Manu's seven constituents of government, and eighteen categories of law would have sounded as common sense to them.[58]

Tibet

It is often claimed that Buddhism is an egalitarian social movement engaged in a non-political protest against hierarchy of Hinduism. The real story of Buddhism is not its apolitical social-protest stance but its consistent engagement with both small republics and royal courts.[59] By the time Tibetans became interested in Buddhism, they had long indigenous traditions of kingship and statecraft.[60] When Buddhism was adopted as the state religion in the eighth century, laws during that time do not seem to have had a direct basis in Buddhist sentiments.[61] Rather, it appears that a juridical system was already in place during the height of the Tibetan empire.[62] With the collapse of the imperial dynasty in the mid-ninth century, Tibetans went through a period of uncertainty and lawlessness. In the tenth and eleventh centuries, the indigenous composition of Buddhist texts gained speed, and the lore of ancient Tibetan emperors began to be included in the new religious literature which posed itself as a hidden treasure constituting the personal statement of these monarchs.[63]

From ninth to eleventh centuries CE some of the renowned Sanskrit texts in India, were translated into Tibetan and were included in the Tanjur collection. In this way some of the Sanskrit works were preserved in Tibet. It seems the Tibetans had a special interest in the niti literature and in particular collections of moral and ethical maxims. Thus, one of the best known collections in India at that time of the Chanakya's maxims,

[57] Wolters, p.189.
[58] Ibid.
[59] Davidson, p.52.
[60] Ibid. p.64.
[61] Jansen, p.222.
[62] Pirie, p.410.
[63] Davidson, p.64.

viz. the *Chanakya-rajaniti-Sastra* version, was preserved in Tibetan through a translation made in the tenth or eleventh century A.D. Since the first studies were made in the Tibetan Tanjur by A. Csoma de Koros in the first half of the nineteenth century, we know that eight niti works are included in the Tanjur.

These works are as follows[64]:

1. Ses-rab brgya-pa shes-bya-bahi rab-tu-byed-pa; in Sanskrit *Prajnasataka-nama-prakarana*
2. Lugs-kyi bstan-bcos Ses-rab sdoh-po shes-bya-ba; in Sanskrit *Nitisastra-prajnadanda-nama*
3. Lugs-kyi bstan-bcos skye-bo gso-hahi thigs-pa shes-bya-ba; in Sanskrit *Nitisastra-jantuposana-bindu-nama*
4. Tshigs-su-bcad-pahi mdsod ces-bya-ba ; in Sanskrit *Gathakosa-nama*
5. Tshigs-su bcad-pa brgya-pa; in Sanskrit *Satagatha*
6. Dri-ma med-pahi dris-lan rin-po-chehi phreh-ba shes-bya-ba; in Sanskrit *Vimalaprasnottara-ratnamala-nama*
7. Tsa-na-kahi rgyal-pohi lugs-kyi bstan-bcos; in Sanskrit *Chanakya-Nitisastra*
8. Lugs-kyi bstan-bcos ; in Sanskrit *Nitisastra*

The Tibetan translation of the *Chanakya Nitisastra* consists of two hundred and fifty stanzas divided into eight chapters. The introductory verse points out the usefulness of the study of the work and lays down some precepts of common character most of them being found in other texts like *Mahabharata, Garuda Purana, Arthasastra* and *Dharnmasastra*. In the first three chapters some counsels of practical prudence for family life are given. Chapters from the fourth to the sixth have been mainly devoted the enumeration of the requisite qualities of the king, royal ministers, commander in chief, and other officers of the kingdom. The last two chapters, i.e. the seventh and eighth which are comparatively long contain verses miscellaneous character. These verses have been collected and compiled from the niti sections of the Mahabharata, *Arthasastra*, *Dharmasastra*s, *Puranas*, and from *Panchatantra and Hitopdesa*.[65]

The Tibetan translation of *Chanakyaniti,* is much like *Arthasastra* in that there much common sense in both texts that is in accord with practical morality. There lingers around the texts a distinct influence of the *Mahabharata*, and the *Dharmasastra*. It may be remarked that the *Chanakyaniti* is a concise work on general ethics and polity compiled by unifying fundamental rules of social life with day to day practical wisdom

[64] Sternbach, p.364.
[65] Pathak, p.34.

to make the life successful with prosperity and happiness on the basis of Vedic insights communicated through the Epics, *Dharamasastra*, *Arthasastra*, and the *Puranas*.[66]

Conclusion

It is for sake of the wellbeing of Individual and society that the *Dharmasastra* explored ways of good conduct of individuals and of social cohesion by balancing coexistence and autonomy. Diverse *Dharmasastras* suggested contextual systems of high moral and social conduct in which individuals and societies could grow and flourish in the path of security and development through willing obligations to the

laws of nature and society. Only a combination and coordination of *Dharma, Artha, and Kama* can ensure wellbeing of individual and society.

The approach of the *Dharmasastra,* and its adaptations in *Dhammasattha* and other texts and practices in Asia, of combining truth with justice, equity with law and discretion with reason has a universal message for modern law. This conception of law goes beyond the Western concept of modern law which divides reality into that which we can see and say clearly and the rest, which we can better pass over in silence. What we can see and say clearly amounts to little. If we omitted all that is unclear we would probably be left with completely superficial and trivial repetition of words. By paying too much attention to what we perceive with our senses, we lose connection with the essential values of human life. If a dispute is decided by mere words of injunctions it is violation of *Dharmasastra*.

It is often assumed that in the work of arguing and deciding disputes, the judges and the lawyers, much less the litigants, can easily and clearly comprehend the process that is followed. Nothing could be farther from the truth. As *Asya Vamya Sukta* and *Vag Sukta* of *Rg Veda* says, the meaning is in insight and not merely in words.

Sources of information, precedents, reason, custom, intuition, individual understanding of law morals, all these elements enter in varying proportions to make the strange compound of the process of dispute resolution. It is uncertain, connected, complementary, emergent and creative. Decisions are made as much by the logic of probabilities and intuition as by the logic of certainty and reason.

The provisions for a diversity of arrangements to suit the location and vocation of the people and serve them in their local environment, collective decision making, integrity of judges and simplicity of procedure were the predominant features of the legal system given in the *Dharmasastra* like *Manusmriti*, *Yagnavalkyasmriti* and *Naradasmriti*, and the *Arthasastra* and *Nitisastra*. These features of Hindu law contributed to its adaptations in the form of *Chanakya Nitisara* in Tibet, *Dhanmmasatthas* in Burma and Thailand, *Thesawalamai* and *Kandyan* law in Sri

[66] Ibid. p.20.

Lanka, *Kutaramanava* in Indonesia and *Vyavaharapada* in Cambodia.

These diverse texts embody both the spirit of justice, equity and good conscience as well as insight of the judges to make decisions that ensure complete humane justice. In the *Dharmasastra*, the judges were empowered to do complete justice without being always bound by the letter of the texts. This discretion ensured adaptability to mould decisions in accordance with given situations. The fact that this power was conferred only on the judges of learning, good conduct and conscience was an assurance that it would be used carefully for human wellbeing.

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